TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 712

NEW YORK LIFE INSURANCE COMPANY, PETITIONER

vs.

WILLIAM H. EDWARDS, AS COLLECTOR OF INTERNAL REVENUE, ETC.

PETITION FOR CERTIORARI FILED AUGUST 26, 1925
CERTIORARI GRANTED OCTOBER 26, 1925

No. 804

WILLIAM H. EDWARDS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, PETITIONER

vs.

NEW YORK LIFE INSURANCE COMPANY

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1925
CERTIORARI GRANTED NOVEMBER 30, 1925

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

(31435)
(31527)

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Writ of Error.

1

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district before you, between NEW YORK LIFE INSURANCE COMPANY, plaintiff and WILLIAM H. EDWARDS as Collector of Internal Revenue for the Second District of New York, defendant, a manifest error hath happened to the great damage of said plaintiff as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Second Circuit together with this writ, so that you have the same at the city of New York on the 18th day of January next in the said United States Circuit Court of Appeals to be there and then held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

2

3

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States this 19th day of December, A. D. 1924.

ALEX GILCHRIST JR.
[SEAL] Clerk

Allowed by
JULIAN W. MACK,
Judge.

Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS as Collector of Internal Revenue for the Second District of the State of New York,
Defendant.

Complaint.
L25-339.

Now comes New York Life Insurance Company, plaintiff, and complains of William H. Edwards as Collector of Internal Revenue for the Second District of the State of New York, defendant, and alleges, upon information and belief, that,—

I.—This case arises under a law providing for internal revenue, to wit, under the Revenue Act

of 1913, entitled "An Act to reduce Tariff 7
Duties and to provide Revenue for the Government and for other Purposes," approved October 3, 1913, imposing an income tax on corporations.

II.—Said plaintiff now is and ever since the year 1843 has been a corporation duly organized and existing under and by virtue of the laws of the State of New York for the purpose and engaged in the business of making insurance upon the lives of persons and all and every insurance appertaining to life, having its principal office and place of busness at Number 346 Broadway, in the City of New York, in the State 8
of New York, in the Second Internal Revenue District of said State. The defendant, William H. Edwards, was, during the year 1918, thence has been and still is, the duly appointed, qualified and acting Collector of Internal Revenue for the Second District of the State of New York.

III.—On, to wit, the 26th day of February, 1914, said plaintiff duly made and filed with the Collector of Internal Revenue for said Second District of New York, on Form 1030 duly furnished it by the Treasury Department for that 9
purpose, what it believed to be a full, complete and true return, under oath of its President and Treasurer, of its net income received during the calendar year ending December 31, 1913, therein and thereby setting forth all the facts required by said Revenue Act as well as all the facts called for by said form, and showing that the entire net income of said corporation arising or accruing from all sources during said calendar year ending December 31, 1913, was the sum of, to wit, $10,057,857.40 and no more. A copy of said return is hereto attached marked Exhibit A.

10 IV.—The plaintiff made and filed its said return in good faith and in the honest belief that the same contained a full, complete and true statement and return of the gross amount of the income of said plaintiff received by it within said taxing year from all sources, and of the deductions from said gross amount of the income of said plaintiff, and of the entire net income arising or accruing from all sources during said taxing year to said plaintiff, all as required and authorized by said law and the Regulations of the Treasury Department. No part nor item of said return was wilfully or intentionally false or fraudulent, nor did it contain any
11 wilful or intentional understatement or undervaluation.

V.—Said Collector duly received said return and forthwith transmitted the same to the Commissioner of Internal Revenue who thereupon duly assessed an income tax against said plaintiff in the sum of $100,578.57 upon its said entire net income arising or accruing from all sources during said year ending December 31, 1913, which said income tax said plaintiff duly paid on the 26th day of June, 1914.

12

VI.—Thereafter and in, to wit, the year 1918, said Commissioner of Internal Revenue undertook to audit the plaintiff's accounts for said year 1913, and he there and then and on, to wit, the 20th day of June, 1918, amended said plaintiff's said return and thereby erroneously made the net income of said plaintiff for said year appear to be the sum of $9,773,992.71 in excess of said net income as shown by the plaintiff's said return; and thereupon said Commissioner there and then assessed against said plaintiff an additional income tax for said

year of 1% of said $9,773,992.71, an additional income tax of, to wit, $97,739.93; and said defendant as the Collector of said District duly served upon said plaintiff a notice of said additional assessment and demanded the payment thereof on or before August 5, 1918, and threatened said plaintiff to impose upon it a 5% penalty with 1% interest per month from the 24th day of July, 1918, until paid, if said plaintiff failed to pay said additional income tax on or before said 5th day of August, 1918. Thereupon said plaintiff, compelled thereto by said notice and demand and by said threats of said defendant, and in order to avoid said penalties, on, to wit, the 5th day of August, 1918, paid said defendant as such Collector said sum of $97,739.93 so claimed and exacted by him as an additional income tax for said year, but paid it involuntarily and under protest, and there and then duly demanded refund and repayment of said sum and of each and every part and item thereof, and gave due notice that unless said defendant complied with said plaintiff's said demand said plaintiff would resort to every recourse provided by law for the recovery of the same; but said defendant there and then and at all times failed and refused to comply with said demand, and received and retained said sum so paid, and every part of it. Said additional income tax and each and every part and item thereof was erroneously, illegally, unjustly, wrongfully and excessively assessed and collected, except as to the sum of $7,183.74 thereof.

VII.—Thereafter and on, to wit, the 6th day of September, 1918, said plaintiff duly made its appeal to the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury

16 established in pursuance thereof, and there and then duly made and filed in the Treasury Department its claim for refund of said tax, and thereafter and on, to wit, the 26th day of June, 1919, duly made and filed in the Treasury Department an amendment to its said claim for refund, and thereafter and on, to wit, the 17th day of May, 1920, duly made and filed its second amendment to its said claim for refund. And thereupon and thereafter said Commissioner of Internal Revenue duly considered said plaintiff's said appeal and claim for refund and its said several amendments thereto, and on, to wit, the 15th day of April,
17 1921, decided the same against the plaintiff and refused to refund any part of said tax.

VIII.—Said additional income tax was illegally assessed and wrongfully collected with respect to the several items following, each of which formed a part thereof, to wit,—

(*a*) The plaintiff is a mutual life insurance corporation without any shares of capital stock, transacting the business of life insurance on the purely mutual, level premium plan. It is the essence of mutual life insurance on the level premium plan
18 that each policyholder is entitled to his insurance at cost, but must pay yearly in advance an estimated sum as premium and that at the end of each calendar year the corporation shall take an account of its affairs, and thereby ascertain what was the actual cost for the year to each insured, and how much each insured over-paid for the year; and that the corporation shall then account to each insured for such ascertained over-payment either by paying it back or crediting it to, or treating it as an abatement of premium of, such individual policyholder. The plaintiff has always transacted its said business in this way.

During said taxing year and long prior thereto 19
the plaintiff had outstanding a class of policies under which the annually ascertained over-payment of each individual policyholder was each year credited to such individual policyholder and accumulated at interest, and at the end of the accumulation period specified in the several policies, —five, ten, fifteen or twenty years after the date the policy was taken out,—the over-payments so credited and accumulated were apportioned among and paid to the members of the class who survived the accumulation period and kept their policies in force.

In making its said return the plaintiff, acting 20
under what it believed to be the authority of that clause of said Revenue Act which provides that "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year," did not include as income in said taxing year any part of the aggregate amount of said annually ascertained, credited and accumulated over-payments of premiums which were apportioned 21
among and paid to said policyholders within said taxing year and which amounted to the sum of, to wit, $9,292,932.49. But the Supreme Court of the United States, in construing the above quoted clause of said law in the case of *Penn Mutual Life Insurance Company* vs. *Lederer,* decided April 19, 1920, appeared to have indicated that the plaintiff had not correctly complied with said law in not including as income in said year the aggregate amount of said annually ascertain, credited and accumulated over-payments of premiums which

were apportioned among and paid back to said policyholders during said taxing year, and therefore the plaintiff, in and by its said amendments to its said claim for refund, advised said Commissioner, and the fact was and is, that portions of actual premiums were received from the plaintiff's individual policyholders of said class which were credited to such individual policyholders within said taxing year; that the aggregate sum so received and credited to such individual policyholders within said taxing year was the sum of, to wit, $8,189,918; and that no part of said aggregate sum so received and credited ought to be included as income. But in amending and correcting said return and assessing and collecting said additional income tax, said Commissioner refused to recognize the plaintiff's right under said provision of said Revenue Act not to include as income for said year said sum of $8,189,918 there and then so received and credited, or any part thereof, and by his said refusal made the plaintiff's net taxable income for said year appear to be greater than in fact it was by said sum of $8,189,918; and he there and then illegally assessed against and wrongfully collected from said plaintiff an additional income tax for said year on account thereof accordingly in the sum of $81,899.18, which formed a part of said total sum of $97,739.93.

(*b*) In amending and correcting said return and assessing and collecting said additional income tax, said Commissioner included as income for said year two items, one amounting to the sum of $28,309.97, described in the plaintiff's annual statement for said year as commissions advanced in previous years now repaid, and the other amounting to the sum of $1,627.61, described in

said annual statement as doubtful debts recovered, 25
said two items aggregating the sum of $29,937.58; and he there and then illegally assessed against and wrongfully collected from said plaintiff an additional income tax for said year on account of said two items accordingly in the sum of $299.38, which formed a part of said total sum of $97,739.93. But no part of either of said two items constituted income for the year. A part of said item of $28,309.97, to wit, $6,000 thereof, consisted of sundry small loans of money made by the plaintiff prior to the year 1907, to various persons, which were paid back to it during said 26
taxing year, and were capital, not income; and the remainder of said item, to wit, $22,309.97 thereof, consisted of sundry credit balances on the books of the plaintiff to the account of some of its soliciting agents which aggregated said sum of, to wit, $22,309.97, and was a liability of the plaintiff, not income; and the other of said items, to wit, said item of $1,627.61, was composed of sundry small loans previously made and other outstanding capital claims which were repaid during the taxing year, and were capital, not income.

(c) In making and filing its said return, the 27
plaintiff erroneously included therein as a part of its net income for said year $129,594.07 as net profit from the sale or maturity of ledger assets; but the plaintiff has since discovered, and alleges the fact to be, that the net profit of the plaintiff during said year from the sale or maturity of ledger assets was only the sum of, to wit, $44,557.88, and no more; that is to say, was $85,036.19 less than said sum returned by the plaintiff and taxed as aforesaid as a part of its said net income for said year; and in amending and

28 correcting said return, said Commissioner duly discovered plaintiff's said error in its said return and should have credited said plaintiff with said sum of $85,036.19 as an over-statement of said net profit for said year and refunded to it the sum of $850.36, which was the amount of the tax assessed and collected as aforesaid on account of said over-statement of said net profit; but said Commissioner failed and refused to give the plaintiff said credit or to refund said $850.36 so over-paid, or any part thereof, and by reason of the premises the plaintiff is entitled to recover said sum of $850.36.

29

(*d*) During said taxing year, said plaintiff sustained a loss of $332,466.72 in that it theretofore purchased certain securities at a premium, which at their maturity a period of years in the future were payable at par only, and which therefore, as they approached their maturity resulted in a loss accordingly; the proportionate loss on said securities thus sustained for said year between the date of their purchase at a premium and the date of their maturity amounted in the aggregate to said sum of $332,466.72, which said loss the

30 plaintiff, in making its said return, deducted from the amount of its gross income for said year. But in amending and correcting said return and assessing and collecting said additional income tax, said Commissioner refused to recognize said loss or to allow said deduction from gross income, or any part thereof, and by his said refusal made the plaintiff's net taxable income for said year appear to be greater than in fact it was by said sum of $332,466.72; and he there and then illegally assessed against and wrongfully collected from said plaintiff an additional income tax for said year

on account thereof accordingly in the sum of 31
$3,324.67, which formed a part of said total sum of $97,739.93.

(*e*) Many of the plaintiff's outstanding policy contracts provided for special benefits in the event that the insured should become wholly and permanently disabled while the policy was in force. For these special benefits the plaintiff duly charged and collected from each such insured, and the policy required the insured to pay, and he did pay, an annual premium with and as a part of the annual premium paid for all other insurance benefits under the policy. To meet this contract liability under 32
this feature of the plaintiff's policies, the plaintiff was required by law to carry, and it did carry, a reserve fund which it increased during said taxing year. The net addition to said reserve fund within said year was the sum of, to wit, $16,629, which, in making its said return, the plaintiff deducted from the gross amount of its income for said year pursuant to that provision of said law which authorizes an insurance company to deduct the net addition, if any, required by law to be made within the year to reserve funds. But in amending and correcting said return and assessing and collecting said addi- 33
tional income tax, said Commissioner refused to allow said deduction, and by his said refusal made the plaintiff's net taxable income for said year appear to be greater than in fact it was by said sum of $16,629; and he there and then illegally assessed against and wrongfully collected from said plaintiff an additional income tax for said year on account thereof accordingly in the sum of $166.29, which formed a part of said total sum of $97,739.93.

(*f*) The plaintiff had outstanding during said taxing year contracts of life insurance in all of

34 the states, territories and possessions of the United States and practically in every country of the civilized world. Many deaths of the plaintiff's insured occurred during and especially near the end of said taxing year which had not been reported to the plaintiff but upon which it was under liability for the payment of the face amount of its several policies on the life of each such insured. Therefore in order to provide funds required to meet all such liabilities it was necessary for the plaintiff to carry and the law required it to carry, and it did carry, a reserve fund which it increased during said taxing year. The net
35 addition to said reserve fund within said taxing year was the sum of $250,000, which the plaintiff in making its said return deducted from the gross amount of its income for said year pursuant to that provision of said law which authorizes an insurance company to deduct the net addition, if any, required by law to be made within the year to reserve funds. But in amending and correcting said return and assessing and collecting said additional income tax, said Commissioner refused to allow said deduction and by his said refusal made the plaintiff's net taxable income for said
36 year appear to be greater than in fact it was by said sum of $250,000; and he there and then illegally assessed against and wrongfully collected from said plaintiff an additional income tax for said year on account thereof accordingly in the sum of $2,500, which formed a part of said total sum of $97,739.93.

(*g*) The plaintiff had outstanding during said taxing year a large number of annuity contracts under which it was obligated to pay the several holders thereof a specified sum of money each year

in monthly instalments. To meet the liability of 37
the plaintiff under this class of its outstanding contracts, the plaintiff was required by law to carry, and it did carry, a reserve fund which it increased during said taxing year. The net addition to said reserve fund within said year was the sum of, to wit, $151,641, which the plaintiff in making its said return deducted from the gross amount of its income for said year pursuant to that provision of said law which authorizes an insurance company to deduct the net addition, if any, required by law to be made within the year to reserve funds. But in amending and correcting said return and assessing and collecting said 38
additional tax, said Commissioner refused to allow said deduction and by his said refusal made the plaintiff's net taxable income for said year appear to be greater than in fact it was by said sum of $151,641; and he there and then illegally assessed against and wrongfully collected from said plaintiff an additional income tax for said year on account thereof accordingly in the sum of $1,516.41, which formed a part of said total sum of $97,739.93.

WHEREFORE said plaintiff prays judgment against said defendant for the sum of $90,556.19, 39
with interest thereon from the 5th day of August, 1918, and costs.

JAMES H. MCINTOSH,
Attorney for Plaintiff,
Office and Post Office Address,
346 Broadway, New York City,
Borough of Manhattan.

40 STATE OF NEW YORK,
County of New York, } ss.:
City of New York,

SEYMOUR M. BALLARD of lawful age being first duly sworn deposes and says that he is an officer, to wit, Secretary of the New York Life Insurance Company, the plaintiff in the foregoing suit, and authorized by it to make this verification; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he be-
41 lieves to be true.

SEYMOUR M. BALLARD

Subscribed in my presence and sworn to before me this 26th day of April, 1921.

LOUIS H. COOK
Notary Public

[NOTARIAL SEAL]

42

Exhibit A.

43

THE PENALTY

For failure to have this Return in the hands of the Collector of Internal Revenue on or before March 1, or within 60 days after the close of the fiscal year is a sum not exceeding $10,000.

(See instructions on other side.)

UNITED STATES INTERNAL REVENUE

RETURN OF ANNUAL NET INCOME. 44

(Section 2, Act of Congress approved October 3, 1913.)

INSURANCE COMPANIES.

RETURN OF NET INCOME Received during the calendar (fiscal) year ended December 31st, 1913, by New York Life Insurance Company, the principal place of business of which is located at 346 Broadway, City or Town of New York, in the State of New York.

(The "year" as hereinafter used means the calendar year or fiscal year as the case may be.) 45

1. Total amount of paid-up capital stock outstanding, or, if no capital stock the capital employed in business, at close of the year above stated. (See Note 8 on reverse of this form.) None—the Company is mutual.

2. Total amount of bonded and other indebtedness, outstanding at close of year (See Note 9). Bonded Indebtedness—none. Other indebtedness—Only such as is incident to the current business of the Company.

3. GROSS INCOME (see Note A, and instructions, paragraphs 10, 18, 21, 22, 23, 25, and 26)..... $108,847,520.33

46 DEDUCTIONS.

4. (*a*) Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation EXCLUSIVE OF INTEREST PAYMENTS (See Note B)...$12,475,990.86

(*b*) All rentals or other payments required to be made as a condition to the continued use or possession of the property (see Note 12 on reverse of this form)..$ 573,111.29

47

5. (*a*) Total amount of losses sustained during year not compensated by insurance or otherwise.$ 52,384.10

(*b*) Total amount of depreciation for the year (see Note 13).....$ 478,989.90

(*c*) Total amount (other than dividends) paid within the year on policy and annuity contracts $51,422,659.28

(*d*) Total amount of net addition required by law to be made within the year to reserve fund (see Note 28)....$30,702,059.05

48

(*e*) Amounts of premiums repaid to policy holders and interest paid thereon (applicable only to Mutual Marine Insurance Companies).....$ 0

(*a*) Total amount of interest accrued and paid within the year on an amount of bonded or other indebtedness not

	exceeding one half of the sum of its interest-bearing indebtedness and its paid-up capital stock outstanding at the close of the year.....$	0	49
	(*b*) Total amount of interest received upon obligations of a State or political subdivision thereof and upon the obligations of the United States or its possessions .....$	1,731,512.78	
	7. (*a*) Total taxes paid during the year imposed under authority of the United States or any State or Territory thereof (See Note 20) .....$	1,214,697.38	50
	(*b*) Foreign taxes paid....$	138,258.29	
	TOTAL DEDUCTIONS.....	$98,789,662.93	
	8. Net income on which tax at 1 per centum is calculated.....	$10,057,857.40	

STATE OF NEW YORK COUNTY OF NEW YORK, TO WIT:

Darwin P. Kingsley, President, and Frederick H. Shipman, Treasurer, of the New York Life Insurance Company, a corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, including interest upon obligations of a State or any 51

52 political subdivision thereof, and upon the obligations of the United States or its possessions, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount upon which the tax at 1 per centum is to be calculated and assessed under the terms of the Federal Income Tax Law of October 3, 1913, subject to the supplementary memorandum on the reverse side.

DARWIN P. KINGSLEY
President.

53 FREDERICK H. SHIPMAN.
Treasurer.

Sworn and subscribed to before me this
26th day of February, 1914.

LOUIS H. COOKE,
Notary Public.
(Official capacity.)

{Seal of Officer taking Affidavit.}

54

Answer.

55

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS as Collector of Internal Revenue for the Second District of the State of New York,
Defendant.

L25—339

56

Defendant above named by William Hayward, United States Attorney for the Southern District of New York, his attorney, answering the complaint herein alleges:

FIRST: Answering the allegations of Paragraph numbered III of the complaint, defendant admits that on or about the 26th day of February, 1914, plaintiff filed with the Collector of Internal Revenue for the Second District of New York on Form 1030 (revised) what purported to be a return under oath of its President and Treasurer of its net income received during the calendar year ending December 31, 1913, substantially in the form of Exhibit A annexed to said complaint, but for greater certainty defendant begs leave to produce upon the trial the original or a certified photostat copy of said return. Defendant admits that said return showed a net income to said plaintiff for said calendar year of $10,057,857.40. Except as hereinbefore specifically admitted, defendant denies

57

that he has any knowledge or information thereof sufficient to form a belief as to each and every allegation in said Paragraph numbered III contained.

SECOND: Defendant denies that he has any knowledge or information thereof sufficient to form a belief as to each and every allegation of Paragraphs numbered IV and VIII of the complaint.

THIRD: Answering the allegations of Paragraph numbered VI of the complaint, defendant denies that he has any knowledge or information thereof sufficient to form a belief as to the allegation that the Commissioner of Internal Revenue erroneously made the net income of the plaintiff for the calendar year ending December 31, 1915 to be $9,773,992.71 in excess of the net income as shown by plaintiff's said return; upon information and belief defendant denies that the additional income tax assessed by the Commissioner of Internal Revenue and each and every part and item thereof was erroneously, illegally, unjustly, wrongfully or excessively assessed and collected except as to the sum of $7,183.74 thereof; defendant denies that he has any knowledge or information thereof sufficient to form a belief as to the allegations that said additional income tax was paid by plaintiff involuntarily and under protest and that plaintiff duly demanded refund and repayment of said sum and of each and every part and item thereof and gave due notice that unless defendant complied with said demand, plaintiff would resort to every recourse provided by law for the recovery of the same.

FOR A FURTHER, SEPARATE AND COMPLETE DEFENSE 61
TO THE CAUSE OF ACTION, IF ANY, SET FORTH IN THE COMPLAINT HEREIN, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

FOURTH: That this is a suit for the recovery of an internal tax alleged to have been erroneously and illegally assessed and collected and the same was not brought within two years next after the alleged cause of action accrued.

WHEREFORE defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this action.

WILLIAM HAYWARD, 62
United States Attorney,
Attorney for Defendant,
Office & P. O. Address:
U. S. Courts & P. O. Building,
Borough of Manhattan,
City of New York.

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York. } ss:

WILLIAM H. EDWARDS, being duly sworn, deposes and says that he is the defendant in the above en- 63
titled action, that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters, he believes it to be true.

WM. H. EDWARDS

Sworn to before me this 30th day of September, 1921.

MIRIAM R. BANGERT
[SEAL] Notary Public et

64 **Judgment.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS as Collector of
65 Internal Revenue for the Second
District of the State of New York,
Defendant.

Judgment
L25—339

This cause duly came on to be heard before the Honorable Julian W. Mack, United States Circuit Judge, and a jury at a stated term of the United States District Court for the Southern District of New York held on the 15th day of December, 1924, at the United States Court rooms in the Borough of Manhattan in the City, County and State of New York, in the Southern District of New York, and
66 the plaintiff having appeared herein by James H. McIntosh, its attorney, and the defendant having appeared by William Hayward, United States District Attorney for the Southern District of New York, his attorney, Forest D. Siefkin, Special Attorney, Bureau of Internal Revenue, and Thomas J. Crawford, Assistant United States Attorney, of Counsel; and the allegations and proofs of the parties having been heard and considered and at the close of the evidence for both sides the attorneys for the plaintiff and the defendant having each moved for the direction of a verdict and the Court having sustained the defendant's motion for the direction of a verdict on that item in issue in said

cause and referred to and described in paragraph VIII(*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts, and having sustained the plaintiff's motion for the direction of a verdict on the other items in issue in said cause, and the jury having duly returned a verdict accordingly, and the costs of said plaintiff having been taxed in the sum of $21.90, now, on motion of William Hayward, United States Attorney for the Southern District of New York, attorney for defendant, 67

IT is now here considered and adjudged by the Court that the plaintiff's complaint be and it is hereby dismissed on the merits as to that item in issue in this cause and especially referred to and described in paragraph VIII(*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts, and in the Exhibits attached to the Agreed Statement of Facts. 68

And on motion of James H. McIntosh, attorney for plaintiff,

IT is now here considered and adjudged that the plaintiff have and recover from the defendant on each and all the items in issue in said cause except that item especially referred to and described in paragraph VIII(*a*) of the plaintiff's complaint and in paragraph First to Twentieth, both inclusive, of the Agreed Statement of Facts judgment for the principal sum of $7,880.47 with interest thereon from August 5, 1918, amounting to $3,007.21 making a total of $10,927.57 and costs taxed at $21.90, and that the plaintiff have execution against said defendant therefore. 69

Judgment signed this 15th day of December, 1924.

JULIAN W. MACK
Judge

70 **Plaintiff's-Defendant's Bill of Exceptions.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS as Collector, etc.,
Defendant.

71

L25–339.
Plaintiff's-Defendant's Bill of Exceptions.

BE IT REMEMBERED that at a stated term of said court begun and holden in the City of New York in and for the Southern District of New York on the 15th day of December, 1924, before the Honorable Julian W. Mack, Circuit Judge, the issues joined in the above entitled cause duly came on to be tried before said Judge, and on said day the parties aforesaid by their counsel, according to the statute made and in such cases provided, duly stipulated and agreed to try said case before a jury of one which was thereupon duly impaneled and
72 sworn.

The plaintiff was represented in said trial by

JAMES H. MCINTOSH, its attorney,

and the defendant was represented by

The Honorable WILLIAM HAYWARD, United States Attorney,
by the Honorable THOMAS J. CRAWFORD, Assistant United States Attorney,
and by the Honorable FOREST D. SIEFKIN
and the Honorable EDWARD H. HORTON, Special Attorneys of the Bureau of Internal Revenue,

and thereupon the plaintiff, to maintain the issues in said cause, introduced and read in evidence the following Agreed Statement of Facts and the exhibits attached thereto, duly made and signed, between the plaintiff and the defendant, to wit:— 73

Agreed Statement of Facts.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

74

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of the State of New York,
Defendant.

Doc. 25, Page 339
1913 Income Tax

AGREED STATEMENT OF FACTS.

75

The parties hereto now here stipulate and agree that the following facts are true, subject to any objection as to the relevancy or materiality of any fact or facts which either party may desire to make either on the trial or on the argument of any appeal herein, and reserving the right of both parties to this stipulation to introduce such other and further evidence as they deem necessary.

FIRST. The plaintiff is a life insurance corporation duly incorporated in the year 1843 under a special charter, and existing under and by virtue of the laws of the State of New York. The business

76 of the plaintiff is, and always has been, making insurance upon the lives and health of persons, and all and every insurance appertaining to life, granting annuities and making endowments. The plaintiff is a mutual company transacting the business of life insurance on the purely mutual, level premium plan and has no shares of capital stock nor stockholders. Its principal office and place of business is in the city, county and state of New York, in the Second Internal Revenue District in said state. It commenced its said business in the year 1845, and has ever since been, and still is, engaged in such business, and continuously for more
77 than twenty-five years last past the plaintiff has been duly licensed to transact, and has been engaged in transacting its said business of life insurance in the several states, territories and possessions of the United States, in the District of Columbia and in many foreign countries. Its insurance policies are all issued on the mutual, level premium plan.

SECOND. During the calendar year 1918 and thereafter, the defendant was the duly appointed qualified and acting Collector of Internal Revenue for the Second Internal Revenue District of New
78 York.

THIRD. Under the provisions of the Act of Congress entitled, "An Act to Reduce Tariff Duties and to Provide Revenue for the Government and for Other Purposes", approved October 3, 1913, the plaintiff, by Darwin P. Kingsley, its President, and Frederick H. Shipman, its Treasurer, made and on the 26th day of February, 1914, filed with the Collector of Internal Revenue for the Second Internal Revenue District of New York on form 1030 duly furnished it by the Treasury Department for that purpose an income tax return under oath of its

president and treasurer of its net income received 79
during the calendar year ending December 31st, 1913, as follows,—

Form 1030

"To be filled in by collector — To be filled in by Internal Revenue Bureau

THE PENALTY

for failure to have this return in the hands of the collector of internal revenue on or before March 1 or within 60 days after the close of the fiscal year is a sum not exceeding $10,000.

UNITED STATES INTERNAL REVENUE 80

RETURN OF ANNUAL NET INCOME

(Section 2, Act of Congress approved October 3, 1913)

INSURANCE COMPANIES

"RETURN OF NET INCOME Received during the calendar (fiscal) year ended December 31st, 1913, by New York Life Insurance Company, the principal place of business of which is located at 346 Broadway, City or Town of 81
New York, in the State of New York.

"1. Total amount of paid-up capital stock outstanding, or, if no capital stock the capital employed in business, at close of the year above stated. (See Note 8 on reverse of this form) .....None.—The Company is mutual.

"2. Total amount of bonded and other indebtedness at close of year. (See Note 9)..... Bonded Indebtedness—none.

Other Indebtedness—Only such as is incident to the current business of the Company.

82

"3. Gross Income (see Note A, and instruction, paragraphs 10, 18, 21, 22, 23, 25, and 26)		$108,847,520.33
DEDUCTIONS.		
4. "(a) Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation EXCLUSIVE OF INTEREST PAYMENTS. (See Note B)	$12,475,990.86	
"(b) All rentals or other payments required to be made as a condition to the continued use or possession of the property. (See Note 12 on reverse of this form.)	$ 573,111.29	
5. "(a) Total amount of losses sustained during the year not compensated by insurance or otherwise	$ 52,384.10	
83 "(b) Total amount of depreciation for the year. (See Note 13)	$ 478,999.90	
"(c) Total amount (Other than dividends) paid within the year on policy and annuity contracts	$51,422,659.28	
"(d) Total amount of net addition required by law to be made within the year to reserve fund. (See Note 28)	$30,702,059.05	
"(e) Amounts of premiums repaid to policy holders and interest paid thereon (applicable only to Mutual Marine Insurance companies)	0	
6. "(a) Total amount of interest accrued and paid within the year on an amount of bonded or other indebtedness not exceeding one-half of the sum of its interest bearing indebtedness and its paid-up stock outstanding at the close of the year	0	
84 "(b) Total amount of interest received upon obligations of a State or political subdivision thereof and upon the obligations of the United States or its possessions	$ 1,731,512.78	
"7. (a) Total taxes paid during the year imposed under authority of the United States or its possessions. (See Note 20)	$ 1,214,697.38	
"(b) Foreign taxes paid	138,258.29	
"TOTAL DEDUCTIONS		$ 98,789,662.93
"8. Net income on which tax of 1 per cent is calculated		$ 10,057 857.40

"State of New York, County of New York, 85
TO WIT:

DARWIN P. KINGSLEY, President, and FREDERICK H. SHIPMAN, Treasurer of the New York Life Insurance Company, a corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth 86
is the full amount of gross income, including interest upon obligations of a State or any political subdivision thereof, and upon the obligations of the United States or its possessions, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount upon which the tax of 1 per centum is to be calculated and assessed under the terms of the Federal Income Tax Law of October 3, 1913, subject to the supplementary memorandum on the reverse side.
87

DARWIN P. KINGSLEY,
President.

FREDERICK H. SHIPMAN,
Treasurer.

"SWORN AND SUBSCRIBED to before me this 25th day of February, 1914.

LOUIS H. COOKE,
Notary Public.

[NOTARIAL SEAL]

"Supplementary Memorandum

"In stating the gross income in the within return New York Life Insurance Company has not included as income the sum of $15,096,551.67, pursuant to that clause of the Federal Income Tax Law which provides that "Life Insurance Companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder within such year."

FOURTH. The plaintiff made and filed its said return in good faith and in the honest belief that the same contained a full, complete and true return for the purposes of said tax. No part nor item of said return was wilfully false or fraudulent, nor did said return contain any willful or intentional understatement or undervaluation.

FIFTH. The sum of $15,096,551.67 mentioned in said supplemental memorandum attached to said return was made up of the following items,—

	Annual	Deferred	Total
Dividends paid to policyholders in cash	$245,091.83	$9,047,847.66	$9,292,939.49
Dividends applied to pay renewal premiums	4,373,698.10		4,373,698.10
Dividends applied to purchase paid-up additions and annuities	787,870.28	546,161.98	1,334,032.26
Dividends left to accumulate at interest	95,881.82		95,881.82
	$5,502,542.03	$9,594,009.64	$15,096,551.67

The dividends paid in cash to annual dividend policyholders, applied by them to pay renewal premiums, applied to purchase paid up additions and annuities, or left to accumulate at interest

aggregating $5,502,542.03 were overpayments of premiums made in 1912 by said annual dividend policyholders. The deferred dividends paid in cash and applied to purchase paid up additions and annuities aggregating $9,594,009.64 were not overpayments of premiums made in 1912 but were overpayments of premiums made in numerous years previous to 1913 and accumulated at interest and divided among and distributed to the class of deferred dividend policyholders whose policies were in force and required the payment of a dividend in 1913. All of the above item of $9,594,009.64 arose out of deferred dividend policies which reached the end of their several accumulation periods in 1913. 91 92

SIXTH. Said Collector duly received said return and forthwith transmitted the same to the Commissioner of Internal Revenue, who thereupon assessed an income tax against said plaintiff in the sum of $100,578.57 upon its net income during the said year ending December 31, 1913, as shown by said return, which said income tax said plaintiff duly paid without protest on the 26th day of June, 1914.

SEVENTH. Thereafter and on, to wit, the second day of November, 1916, at the request of the Commissioner of Internal Revenue, the plaintiff signed and delivered to him a writing waiving objection to any limitation of time for assessing additional 1913 taxes, but reservng its right to contest the validity and amount of such taxes. 93

EIGHTH. Thereafter said Commissioner of Internal Revenue audited the plaintiff's accounts and amended its said return for said year, and thereby determined that the income deductions and taxes of the plaintiff for the year ending December 31, 1913, were as follows, as shown by his letters to the plaintiff dated March 28, 1917, and June 20, 1918, respectively, to wit,—

94

"Office of Commissioner
Of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to
IT:CA:I
CBH

TREASURY DEPARTMENT
WASHINGTON

March 28, 1917.

NEW YORK LIFE INSURANCE CO.,
346 Broadway,
New York City.

GENTLEMEN:

95 An examination of your return of annual net income for the year 1913 and a comparison made with your report to the Insurance Department of the State of New York shows that your return should have been made on the following basis:

Total income per State report		$124,516,389.19
LESS:		
Interest on State, &c. obligations	$1,731,512.78	
Dividends to additions and annuities	1,334,032.26	
Dividends applied renewal premiums	4,373,698.10	
Dvidends left with Company	191,763.64	
Dividends paid in cash (portion)	0	
Interest on dividends left with Co	0	
Appreciation	279,361.96	
Income tax withheld	394.48	
96 Gross income per adjustment		$116,605,625.97
DEDUCTIONS:		
Expenses	$12,626,317.17	
Rentals	573,111.29	
Losses	52,384.10	
Depreciation	0	
Paid on policies	51,512,501.58	
Net addition to reserve	30,283,789.05	
Taxes (domestic)	1,214,697.38	
Taxes (foreign)	138,258.29	$ 96,401,058.86
Net Income		$ 20,204,567.11
Net Income (original return)		10,057,857.40
Additional income		$ 10,146,709.71
Additional tax		$ 101,467.08

In connection with the amount of $9,292,- 97
939.49, dividends paid to policyholders in cash, you are informed that in the adjustment now submitted, the entire amount of such dividends has been suspended pending the receipt from your company of the amounts representing portions of premiums paid back in cash to individual policyholders during each year, based on the following interpretation placed by this office upon the following language of the income tax laws of October 3, 1913, and September 8, 1916:

'. . . life insurance companies shall 98
not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year.'

The amount authorized by this provision to be excluded from gross premium income on account of any premium refund to any individual policyholder is explicitly limited to an amount not in excess of the actual premium paid by the individual policyholder within the 99
tax year.

Life insurance companies are entitled under the foregoing holding to exclude from gross income any part of the cash dividend paid which is represented by a premium received from the individual policyholders within the return year. Where the dividend is in excess of the premium received in the same year, the excess dividend can not be excluded.

That an adjustment may be made of item # 18 of your disbursement account ('dividends

100 and interest thereon held on deposit surrendered during the year'), you are requested to state the amount of this interest in order that proper credit may be given therefor.

Unless you file in this office on or before April 28, 1917, satisfactory proof that the foregoing adjustment is not correct, the additional tax due in the amount herein mentioned will be duly assessed.

Please give this matter your early attention.

Respectfully,

101 L. F. SPEER,
Deputy Commissioner."

TREASURY DEPARTMENT
WASHINGTON

"Office of Commissioner
Of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to
IT:CA:I
CBH

June 20, 1918.

NEW YORK LIFE INSURANCE COMPANY,
346 Broadway,
102 New York, N. Y.

SIRS:

Receipt of your letter of March 15, 1918, is acknowledged enclosing statements as to the portions of the dividends paid policyholders in cash for the year 1913 that you contend should be excluded from gross income under the provisions of the Acts of October 3, 1913 and September 8, 1916, as amended by the Act of October 3, 1917.

An earlier reply to your letter has been delayed by reason of the fact that this office de-

sired to thoroughly review your representations. From the facts presented it is shown 103
that your company has many semitontine or deferred policies, under which policies the insured or his beneficiary is entitled to receive a dividend at the end of a stated period, provided the policy is in force at that time. If the policyholder dies before the date of the dividend distribution the beneficiary is entitled to receive only the face value of the policy. The dividend which may be apportioned to the policy is not paid to the beneficiary. It has been observed that it is the practice of your company and similar life insurance companies 104
having deferred dividend policies outstanding, to apportion each year to the deferred dividend policyholder as a class, certain parts of their surplus. This surplus is not reserved for the payment of dividends and under certain circumstances may be used for other purposes.

The provisions of the taxing acts, allowing the exclusion from gross income of a life insurance company of portions of premiums, which are paid back or credited to individual policyholders, are in the nature of an exemption from tax and should be strictly construed. A credit 105
of an individual policyholder must be an absolute credit to such a policyholder. A provisional credit to a *class of policyholders* is not an absolute credit to an individual policyholder and is therefore not a credit contemplated by the taxing acts.

Consequently, this office is constrained to hold under the law that only such portions of the premiums actually received from the policyholders as are paid to or actually credited to the accounts of *individual* policyholders

106 within the taxable year may be excluded from the gross income of a life insurance company.

To conform to this ruling, it is held that of the total amount of cash dividends of $9,292,939.49 for the year 1913, the portion that may be excluded from gross income is $372,717.00

In accordance with the foregoing the final adjustment of your return of annual net income will be as follows:

Additional income per office letter of March 28, 1917....	$10,146,709.71
107 Portion of cash dividends now allowed	372,717.00
Additional income as revised..	9,773,992.71
Additional tax of 1%.....	97,739.93

You will therefore be duly assessed additional tax in the amount above outlined (waiver of the statutory limitations being on file in this office). The Collector for your district will inform you as to the date payment will be required.

Respectfully,

DANIEL ROPER,

108 Commissioner."

The Commissioner there and then assessed an additional income tax against said plaintiff for said year accordingly in the sum of $97,739.93. Thereafter and on the 24th day of July, 1918, said defendant as Collector of said district served upon the plaintiff notice of said additional assessment and tax, and there and then demanded payment of said additional sum of $97,739.93, and threatened said plaintiff to impose upon it a five per cent penalty with one per cent interest per month from

the 24th day of July, 1918, until paid if said plain- 109
tiff failed to pay said additional income tax on or before the 5th day of August, 1918. A full, true and correct copy of said notice and demand is contained in and forms a part of the written protest which the plaintiff served upon and filed with the defendant at the time of paying said additional income tax as hereinafter more fully stated.

NINTH. Pursuant to said notice and demand, and because thereof, and of said threatened penalties, the plaintiff on the 5th day of August, 1918, involuntarily and under protest paid the defendant as such Collector of said district and said defendant 110
there and then received from it said sum of $97,739.93 so claimed by him as an additional income tax for said year, and at the time of making said payment the plaintiff filed with the defendant its written protest, a full, true and correct copy of which is hereto attached marked Exhibit 1, and made a part hereof; and said plaintiff there and then duly demanded of said defendant repayment and return of said sum so paid under protest, but said defendant there and then, and at all times, failed, neglected and refused to comply with the plaintiff's said demand. 111

TENTH. Thereafter, and on the 6th day of September, 1918, said plaintiff made its appeal to the Commissioner of Internal Revenue and filed in the Treasury Department its claim for refund of said tax, a copy of which said appeal and claim is hereto attached marked Exhibit 2, and made a part hereof. Thereafter and on the 26th day of June, 1919, and while said appeal was still pending before said Commissioner and undisposed of by him, the plaintiff duly made and filed in the Treasury Department an

112 amendment to its said appeal and claim for refund, a copy of which is hereto attached marked Exhibit 3, and made a part hereof. Thereafter, and on the 26th day of May, 1920, and while said appeal was still pending before said Commissioner and undisposed of by him, the plaintiff duly made and filed in the Treasury Department its second amendment to its said appeal and claim for refund, a copy of which second amendment is hereto attached marked Exhibit 4, and made a part hereof. Thereafter, said Commissioner of Internal Revenue duly considered the plaintiff's said appeal and claim for refund and its said several amendments thereto and on the 15th
113 day of April, 1921, decided the same against the plaintiff and refused to refund any part of said tax.

ELEVENTH. The plaintiff's claim is that the items in dispute in said audit and the additional income tax assessed and collected on account thereof accordingly are as follows,—

I. The plaintiff's deferred dividend policyholders over-paid it in 1912 parts of premiums which aggregated $8,189,918, and the plaintiff claimed that these over-payments should not be included as in-
114 come for the year 1913 under that clause of the law which provides that "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year." But the Commissioner denied this claim and assessed and collected $81,899.18 of said additional tax on account thereof accordingly.

II. The inclusion in gross income of two items 115
aggregating $29,937.58 called in the plaintiff's Annual Report (1) "Commissions advanced in previous years now repaid" $28,309.97, and (2) "Doubtful debts recovered" $1,627.61 and the collection of $299.38 of said additional tax on account thereof accordingly.

III. The refusal to credit the plaintiff with the loss claimed to have been sustained during the year on securities purchased at a premium and payable at maturity at par amounting to $259,740.60, adjustment of book value of bonds to market value $33,437.50, reduction of real estate $38,970.47, and 116
loss on mortgage $318.15, making a total of $332,466.72 and the collection of $3,324.68 of said additional tax on account thereof accordingly.

IV. The refusal to deduct from gross income the net addition made within the taxable year to the funds held to meet the liability for disability benefits provided for in the plaintiff's policies $16,629, and the collection of $166.29 of said additional tax on account thereof accordingly.

V. The refusal to allow as a deduction the net addition made by the plaintiff within the taxable year 117
to the funds held to meet losses which occurred during said year but which had not yet been reported $250,000, and the collection of $2,500 of said additional tax on account thereof accordingly.

VI. The refusal to allow as a deduction the net addition made by the plaintiff within the taxable year to the funds held to meet its liability under outstanding annuity contracts $160,641, and the collection of $1,606.41 of said additional tax on account thereof accordingly.

TWELFTH. The Table Rate of premium provided for in life insurance on the mutual, level premium plan is calculated, First, by adopting an accepted table of mortality showing the death rate for each age of life; and Second, by adopting an assumed rate of interest such as the Company may safely expect to realize upon its invested assets for the duration of all its policies. With these two factors it is calculated just what sum each insured must pay yearly in advance so as to put the Company in funds with which to pay all outstanding policies as they become claims, provided deaths occur exactly in accordance with the table of Mortality, and also provided the rate of interest earned on the Company's invested funds is exactly the same as the rate assumed in calculating its premiums. The sum ascertained in this way is called the net or mathematical premium. But the net or mathematical premium is not the full amount each member must pay into a going concern, because it contains no provision for expense of management and unforeseen contingencies such as excess mortality, diminished interest, investment losses, increased taxation and the like. Therefore, to provide for these there is added to the net or mathematical premium a sum technically called "loading". The net or mathematical premium plus the loading constitutes the Company's Table Rate of Premium or level premium, and is the estimated sum named in the policy as premium to be paid in advance and adjusted to cost when cost is known, and is the maximum sum which the Company can ever require the insured to pay.

THIRTEEN. To find out what was the actual cost of insurance for the year, the plaintiff at the end of each calendar year takes an account of its busi-

ness for the year. The laws of New York and of other states require this. The Company's charter, Article VIII, is as follows,— 121

> "As soon as practicable after the thirty-first day of December each year, the officers of said corporation shall cause a statement to be made of the true state of its affairs, and shall well and truly ascertain the surplus earned by it during said year, which said ascertainment of surplus shall be binding and conclusive upon every person entitled to share in its surplus."

The plaintiff's policyholders paid it in 1912 premiums called for in their respective policies on or about the several dates they became due and as the plaintiff received these premiums it at once credited the amount of the premiums to each individual policyholder in a separate premium account kept with him. In the accounting made at the end of the year, the plaintiff ascertained the amount of its total receipts for the year from which it deducted (1) its policy claims paid for the year, (2) its current expenses, (3) the sum required to increase its reserves, and (4) the amount required to increase the sum held to meet contingencies, and all sums received in excess of these four items constituted the amount of over-payments of premiums made during 1912 which the plaintiff held for return to said policyholders in accordance with the terms of their several policies. As soon as practicable after the 31st day of December, 1912, the plaintiff took said account of its business for the year and thereby ascertained, and the fact was, that its said policyholders had over-paid it for the year the aggregate net sum of $13,900,061.00, consisting of over-payments made by annual dividend policy- 122 123

124 holders aggregating $5,710,143.00, and overpayments made by deferred dividend policyholders aggregating $8,189,918.00.

FOURTEENTH. The plaintiff keeps its accounts as follows,—When it receives a premium from a policyholder, it records the sum so received from him on a card kept for that purpose containing his name and his policy number called a Premium Card./ At the end of each year, including the year 1912, the plaintiff in taking an account of its business for the year, ascertains from its records the total sum received as premiums for the year and the total sum received
125 for the year from all other sources, and these two sums it adds together. It then ascertains the amount of policy claims paid for the year, the amount of its current expenses for the year, the several sums required to increase its reserves and the amount required to increase the sum held for contingencies. These sums it adds together and deducts the amount of them from the amount of its total receipts for the year; the difference constitutes the over-payments of premiums which policyholders made for the year, which it divides between its annual dividend policyholders as a group and
126 its deferred dividend policyholders as a group in proper proportion. In this way the plaintiff ascertained and the fact was that during the calendar year 1912, the over-payments of premiums made by all the plaintiff's policyholders aggregated the sum of $13,900,061, of which aggregate $5,710,143 were the total over-payments made by annual dividend policyholders and $8,189,918 the total over-payments made by deferred dividend policyholders.

Said over-payments of premiums made by the plaintiff's annual dividend policyholders it distributed among those policyholders by a mathematical

calculation based on the amount of annual dividend 127
insurance in force, the year of issue of the several policies, the plan of the policy,—that is, whether it was ordinary life, limited payment life, joint life, endowment or other form of policy,—and the age at issue. By this calculation was ascertained the amount of over-payment made by each insured on each one thousand dollars of insurance for each year of issue on each policy plan and at each age of issue. The over-payment so ascertained, when multiplied by the number of thousands of dollars of annual dividend insurance in each year of issue, on each plan and at each age of issue, 128
equaled precisely $5,710,143 when the products of such multiplication were all added together. This rate of over-payment for each one thousand dollars of insurance the plaintiff recorded on a form in use for that purpose and bound the forms together; and it further multipled the over-payment rate for each one thousand dollars of insurance by the amount of insurance paid for in 1912 under each policy of the year of issue, the insurance plan and the age at issue to which the over-payment rate applied, as shown by said Dividend Rate Volume; and about sixty days before the anniversary of the insurance it entered the product on a card as the amount of 129
the dividend on each such policy to be accounted for to the policyholder on the next anniversary of the policy. This card on which the total amount of the dividend was thus entered was not the same record as the Premium Card on which the plaintiff credited premiums when they were received, but was a different card kept in a different division and contained only the number of the policy, the year, month and day the insurance began, plan of insurance, amount of insurance and the age of the insured at issue, and was used solely for sending out

130 to the annual dividend policyholder notice of the amount of said dividends payable on the anniversary of the policy, and for accounting for the same.

By a like mathematical calculation, the plaintiff ascertained the amount of over-payment made by each deferred dividend insured on each one thousand dollars of insurance for each year of issue on each insurance plan and at each age at issue. The over-payment so ascertained, when multiplied by the number of thousands of dollars of deferred dividend insurance in each year of issue on each insurance plan and at each age at issue, equaled precisely said sum of $8,189,918 when the sums so
131 multiplied were all added together. This rate of over-payment for each one thousand dollars of insurance the plaintiff recorded on a form in use for that purpose, and bound these forms together, each year of issue making a separate volume. But the plaintiff did not, as in the case of annual dividend policies, multiply the over-payment rate so ascertained and recorded for each one thousand dollars of insurance by the amount of insurance in force under each policy, and record the product on a card, but it merged said total over-payments made on deferred dividend policies, namely, said sum of
132 $8,189,918, into an account called in the plaintiff's annual report to the Insurance Department, "Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies", which account recorded the accumulated over-payments of all deferred dividend policies except those on which a dividend was payable during the accountancy year, in the present case during the calendar year 1913; and after the plaintiff had added to said account said sum over-paid in 1912 by the plaintiff's deferred dividend policyholders, the amount thereof was the sum of $85,142,216.

FIFTEENTH: The exact facts relating to all poli- 133
cies may be illustrated by taking the plaintiff's record of what actually happened in the case of two representative policies taken out in the same year at the same age and for the same amount. Policy No. 3664200 was issued in 1905 at age 35 for $10,000 on the annual dividend plan. Policy No. 3686225 was issued in 1905 at age 35 for $10,000 on the deferred dividend plan. Each of these policies was an ordinary life policy and each required the payment of the same annual Table Rate of Premium, namely, $281.10. When these two policies were issued, they were each entered on the plaintiff's records in the group to which they belonged 134
one of them in the group of policies on the ordinary life annual dividend plan issued at age 35 in the year 1905, and the other in the group of policies on the ordinary life deferred dividend plan issued at age 35 in the year 1905. At the end of each year the accounting which the plaintiff then made showed, and the fact was, that the annual over-payments of premium made on each of these policies as shown by the plaintiff's dividend rate records for each one thousand dollars of insurance, and the total annually ascertained over-payments on each policy were as follows,—

135

ANNUAL DIVIDEND POLICY

No. 3664200.

Year Premium Paid.	Rate of over-payment for each $1000 of insurance.	Over-payment for policy.
1905.....	$1.90	$19 00
1906.....	2.21	22.10
1907.....	2.25	22.50
1908.....	2.85	28.50
1909.....	3.51	35.10
1910.....	4.12	41.20
1911.....	4.50	45.00
1912.....	4.87	48.70

136 DEFERRED DIVIDEND POLICY

No. 3686225.

Year Premium Paid.	Rate of over-payment for each $1000 of insurance.	Over-payment for policy.
1905.....	$1.90	$19.00
1906.....	2.21	22.10
1907.....	2.25	22.50
1908.....	2.85	28.50
1909.....	3.51	35.10
1910.....	4.12	41.20
1911.....	4.50	45.00
1912.....	4.87	48.70

137 When the plaintiff at the end of each year ascertained the amount of over-payment made by said insured under Policy No. 3664200 on each one thousand dollars of insurance, it multiplied said sum by ten to get the total over-payment made on said policy insuring for $10,000, and recorded the product on the card of said policy as the amount of dividend on said policy to be accounted for to the policyholder on the anniversary of the policy in the year after the over-payment was made. At least fifteen and not more than forty-five days before the anniversary of the policy, the plaintiff
138 sent the policyholder a notice of the due date of the premium, the amount of it and the time and place of payment, and also the amount of said dividend, and on the anniversary of the insurance in each calendar year next after the year in which the over-payment was made the plaintiff accounted to the policyholder for the over-payment either by paying it back, crediting it, or treating it in abatement of the premium then due. But the plaintiff did not multiply the annually ascertained over-payment rate on each one thousand dollars of insurance by the number of thousands of dollars of insurance in force under the deferred dividend

Policy No. 3686225 and record the same on a card, 139
nor did it settle with the policyholder annually for such ascertained over-payment. On the contrary, it left the over-payment made by such deferred dividend policyholder as a part of the aggregate ascertained over-payments made for the year, and merged the aggregate over-payments made on its deferred dividend policies into said account in which it held the accumulated over-payments of all deferred dividend policyholders, except those on which a dividend was payable during the accountancy year.

A photographic copy of the page of the plaintiff's Dividend Rate Volume No. 45, reduced in size four inches vertically and two inches horizontally, which shows the annually ascertained over-payment rate on each one thousand dollars of insurance made on all deferred dividend policies issued in the year 1905 on the ordinary life plan at all ages with respect to the sixth, seventh, eighth and ninth annual premiums and showing also the amount of the accumulated over-payments upon each one thousand dollars of said insurance held in each of said years is hereto attached marked Exhibit 5 and made a part hereof. 140
The rate of over-payment made in each of said sixth, seventh, eighth and ninth years by each ordinary 141
life policyholder for a policy issued in 1905 at age 35, such as said policy No. 3686225, and the amount of the accumulated over-payments is shown in said Exhibit on that line which contains the figure 35 in the column headed "Age", and in the column which contains the heading for the year in question. For example, the over-payment of premium made on said policy No. 3686225 in the year 1912 for each one thousand dollars of insurance is recorded on the line which contains the figure 35 in the column headed "Age", and in the column

142 on said line which is headed "Eight year dividend rate per M. 1913", and is the sum of $4.87 for each one thousand dollars of insurance. And the accumulated over-payments held on said policy No. 3686225 for each one thousand dollars of insurance is recorded on the line which contains the figure 35 in the column headed "Age" and in the column on that line which is headed "Share per M. December 31, 1912, inc. (which is an abbreviation for the word including) 1913 div. (which is an abbreviation for the word dividend)" and is the sum of $29.98 for each one thousand dollars of insurance. The an-
143 nually ascertained over-payments and the amount of the accumulated over-payments for each one thousand dollars of deferred dividend insurance on the ordinary life plan issued in 1905 and at all ages by the payment of the sixth, seventh, eighth and ninth annual premiums, respectively, is similarly recorded in Exhibit 5 which is a typical record of all deferred and annual dividend policies of each year of issue, insurance plan and age at issue. The plaintiff's Dividend Rate Volume used in recording the annually ascertained over-payments made on annual dividend policies is the same as said Exhibit 5, omitting from Exhibit 5 the several columns
144 therein which contain the accumulated over-payments.

SIXTEENTH: The plaintiff's standard form of a representative deferred dividend policy is attached as an exhibit to the plaintiff's Second Amendment to Claim for Refund, Exhibit 4, and is marked Exhibit B thereto.

The blanks in this form are filled in before the policy is delivered with (1) the anniversary date of the insurance in the year when the dividend becomes due, (2) the face of the policy, (3) the

amount of insurance and of an annuity the reserve on the policy will pay for at the age of the insured on the dividend date, and (4) the policy reserve. 145

SEVENTEENTH: A deferred dividend policyholder may lose or forfeit his annually ascertained over-payments of premiums by lapsing his policy or by dying before the dividend date name in his policy. If he loses or forfeits them, they remain in the fund and are distributed among and paid to the survivors of the class who paid their premiums and whose policies were in force on their anniversary date of the insurance under the policy in the year in which the dividend becomes payable to the class. 146 So that in the dividend year fixed by the deferred dividend policy the plaintiff apportions among and pays to each policyholder on the anniversary of his policy in that year a dividend of surplus made up of two items,—(1) the annually ascertained over-payments of premiums with accumulated interest added thereto, plus (2) the policy's proportionate share of the accumulated over-payments of the members of the class who did not keep their policies in force and survive the accumulation period.

EIGHTEENTH: The plaintiff does not keep a ledger account with any policyholder. It keeps its accounts by the card system, the card kept in one department of its organization showing one aspect of the policy and the card in another department showing another. When the policyholder pays each premium, the plaintiff immediately credits him individually on his premium card with the premium he paid. At the time in 1913 the plaintiff ascertained that the over-payments of premium made in 1912 returnable to its policyholders amounted to $13,900,061.00, it had 1,051,960 policies then outstanding, insuring for $2,169,798,993.00. 147

148 NINETEENTH: The plaintiff has a form in use for advising each deferred dividend insured of the amount of his contingent share of the surplus arising from his overpayments, and advises him of the amount whenever he asks for it. The form is as follows,—

NEW YORK LIFE INSURANCE COMPANY
346 & 348 Broadway, New York.

Policy No.

Insured

ANNUAL STATEMENT OF CONTINGENT SHARE OF SURPLUS FOR THE YEAR ENDING DEC. 31, 19..

149

Contingent share at beginning of year ..... $.....

Interest at per centum for year on above contingent share ..... $.....

Other additions for year to above contingent share... $.....

Total contingent share at end of year ..... $.....

New rate of interest earned by Company for year per centum.

150 Date of distribution .....
....., 19..

This ascertainment and statement shall not be construed as any alteration or waiver of any of the terms and conditions of the policy.

Countersigned by

.....

RUFUS W. WEEKS,
Vice-President and
Chief Actuary.

New York, ..., 19..

TWENTIETH: The plaintiff obtains the data for 151
filling out this form from its dividend rate records, except as to the rate of interest. In sending out this form in 1913, the plaintiff inserted in the blank after the words. "Contingent share at beginning of year", the amount of the policyholder's contingent share as shown by its said dividend rate records before adding thereto the over-payments of premium made in 1912. In the blank after the words, "Interest at per centum for year on above contingent share", the plaintiff inserted "Four" before per centum and in the blank at the end of the clause, four per cent interest for one year on 152
the sum above stated. In the blank in the form after the words, "Other additions for year to above contingent share", the plaintiff inserted the amount of the policyholder's over-payment of premiums made in 1912 which formed a part of said total amount of $8,189,918, the amount of which it calculated by multiplying the number of thousands of dollars of insurance under his policy by his dividend rate per thousand dollars of insurance as shown by its Dividend Rate Volume.

TWENTY-FIRST: The plaintiff's annual reports are
made on a uniform form prepared and adopted by 153
the National Convention of Insurance Commissioners composed of the heads of the Insurance Departments of the several states. A part of Item 37 on the income side of this form is called, "Commissions Advanced in Previous Years Now Repaid". In filling out this item for the year 1913, the plaintiff inserted in the blank left in the form the sum of $28,309.97. This sum of $28,309.97 was the aggregate amount of numerous small sums received by said plaintiff during said taxing year on account of advances made by it to its soliciting agents prior

154 to the enactment of the Insurance Laws of 1906 which prohibited this practice, and which said sums so advanced the several agents receiving such advances were to repay in accordance with the terms of a receipt and agreement for that purpose made and delivered by them severally to the plaintiff at the time of receiving such advance, which said receipt and agreement was on the plaintiff's form in use for that purpose known as Form 2282 as follows,—

2282 July '97. ..... 190..

RECEIVED from the NEW YORK LIFE INSUR-
155 ANCE COMPANY ($.....) .....
..... Dollars, to be charged to my account in the Company's .....
Office and payable on demand, or from commissions or other compensation accrued or accruing under any agreement between me and the said Company.

.....

After 1906 and prior to January 1913 all of these sums advanced to agents had been charged off by the Company as losses, and the amount set out above represents recoveries or collections from the
156 several sources during the year 1913. These sums never were a liability of the plaintiff, but on the other hand they were assets, although frozen assets after being charged off.

In making its said return, the plaintiff did not include in its gross income for the year said sum of $28,309.97 nor any part thereof, but in amending said return and assessing said additional tax the Commissioner included said sum of $28,309.97 as income for the year and assessed and collected on account thereof accordingly a tax of $283.10 which forms a part of said additional tax.

TWENTY-SECOND: In 1910 the plaintiff introduced 157
into some of its contracts of life insurance a clause under which it agreed that upon receipt, before default in the payment of premium, of due proof that the insured had become totally and permanently disabled, the plaintiff would waive payment of any premium thereafter falling due. In taking its account at the end of the calendar year 1913, the plaintiff had then received due proof that the insured under a number of these policies were totally and permanently disabled in accordance with the terms of said contracts providing for the waiver of the payment of future premiums. The value at December 31, 1913, of the future premiums waived on 158
account of total and permanent disability was the sum of $16,629. The value at December 31, 1912, of the future premiums so waived was the sum of $5,637.

In the calculation of the general reserve fund at the end of any calendar year, the Company and the Insurance Department of the State of New York make the computation by deducting from the value of the contractual benefits under each policy the then value of all future premiums under the policy. The general reserve fund of the plaintiff stated in its Annual Statement is thus the reserve computed 159
by deducting the value of all future premiums from the valuation of all policy obligations. But, under the policies on the lives of those who had become totally and permanently disabled and whose contracts provided for the waiver of the payment of future premiums, no future premiums will be received by the plaintiff and therefore, the net reserve reported for these policies is understated to the extent of the value of these future premiums.

In the official blank for the plaintiff's Annual Statement to be used at December 31, 1913, there

160 was an item of liabilities, #9-*a* entitled, "Present Value of Future Premiums Waived on Account of Total and Permanent Disability" and in the plaintiff's Annual Statement, the sum reported under this item was $16,629 at December 31, 1913. The sum of $16,629 reported under Item #9-*a* was not included in the plaintiff's general reserve. In the official blank for use at December 31, 1912, there was no such item as #9-*a*, and the plaintiff included the value at December 31, 1912, of future premiums waived on account of total and permanent disability (viz: $5,637) as a part of the general reserve at that date.

161 If said sum of $5,637 had not been included as a part of the general reserve at December 13, 1912, the net addition to the value of future premiums waived on account of total and permanent disability would have been the excess of $16,629 over $5,637. Since, however, owing to the change in the form of the official blank, the said $5,637 was deducted as a part of the plaintiff's general reserve in obtaining the net addition to the general reserve, the sum to use in obtaining the net addition to the value of future premiums waived on account of total and permanent disability is the sum of

162 $16,629.

TWENTY-THIRD: The plaintiff owns a large amount of securities which it purchased at a premium. It amortizes its securities, and as a result of amortization entered upon its books during the year 1913 as a loss sustained during the year several sums which aggregate $332,466.72. This amount so claimed as a loss represented the yearly proportion of the difference between par which the plaintiff would eventually receive upon securities owned by it if it held such securities until maturity and the purchase price above par. The Commis-

sioner refused to allow any part of this sum as a deduction, and assessed and collected on account thereof accordingly $3,324.67 which forms a part of said additional tax. 163

TWENTY-FOURTH: The laws of New York create an Insurance Department charged with the execution of the laws relating to insurance, the chief officer of which is the Superintendent of Insurance. The laws of New York relating to insurance require the Superintendent of Insurance annually to make valuation of every obligation of each life insurance corporation doing business in the State, and require the Superintendent, as often as he deems it expedient, and at least once in every three years, to examine into the affairs of the plaintiff and to make a full and true report verified by his oath, which report shall comprise all the facts appearing upon the books, papers, records and documents of the plaintiff, or ascertained from the sworn testimony of its officers, agents or other persons examined under oath concerning its affairs; and if the plaintiff or any other such corporation is found after an examination to be in such condition that its further transaction of business would be hazardous to its policyholders or to its creditors or to the public, the laws of New York require the Superintendent to apply to the Courts of the State for an order directing the corporation to show cause why the Superintendent should not take possession of its property, conduct its business and liquidate its affairs, or for such other relief as the nature of the case and the interests of the policyholders, creditors or the public may require. At the end of each calendar year a considerable number of the plaintiff's insured have died whose deaths have not been reported to the plaintiff during the calendar year. The Superintendent of Insurance, act- 164 165

166 ing under the authority given him by the laws of the State, requires the plaintiff to carry, and it does carry, a special fund to meet the plaintiff's liabilities upon these losses which have occurred, but which have not yet been reported. During the year 1913 the plaintiff increased the amount of this fund and the net addition to said fund for said year was the sum of $250,000. In making its said return the plaintiff deducted from gross income this $250,000 pursuant to that clause of the law which authorizes a life insurance corporation to deduct from gross income the net addition required by law to be made within the year to reserve funds. But the Commis-
167 sioner in amending said return refused to allow said deduction, and thereby made the plaintiff's net income for the year appear to be $250,000 more than it would have been if such deduction had been allowed, and he assessed and collected an additional tax thereon accordingly in the sum of $2,500, which forms a part of said additional tax in dispute in this suit.

TWENTY-FIFTH: The plaintiff has a form of contract of employment with many of its soliciting agents under which, if such agents for a period of twenty years continuously devote their entire time,
168 talents and energies in soliciting applications for insurance, and if they shall for the twenty years accomplish certain prescribed minimum results, then at the end of twenty years of such service each such agent becomes entitled to an income for life payable monthly, the amount of the payment being based upon the results obtained by each such agent during the twenty year period. The laws of New York require the Superintendent of Insurance, in making a valuation of the obligations of the plaintiff, to value annuities on the standard of McClintock's "Table of Mortality among Annui-

tants", with interest not exceeding four per centum per annum. Said Superintendent of Insurance after making an examination of the plaintiff and valuing its liabilities, required the plaintiff to carry, and it does carry, a fund to meet its said liabilities on said contracts with its soliciting agents; and this fund it increased during the year 1913. The net addition to said fund for said year was the sum of $160,641, which the plaintiff, in making its said return deducted from gross income under that clause of the law which authorizes a life insurance corporation to deduct the net addition required by law to be made within the year to reserve funds. But in amending said return the Commissioner refused to allow said deduction, and thereby made the plaintiff's net income for the year appear to be $160,641 more than it would have been if said deduction had been allowed, and he assessed and collected an additional tax on account thereof accordingly in the sum of $1,606.41, which forms a part of the tax in controversy in this suit.

169

170

TWENTY-SIXTH: Item VIII (*c*) contained in the plaintiff's Complaint, under which the plaintiff claims a refund of $850.36, has been settled by the parties and is withdrawn from this dispute.

171

TWENTY-SEVENTH: The annual statement of plaintiff for the year 1913, as in other years, was made on a form prepared by the Insurance Department of New York and other states. The plaintiff during the year 1913 kept its books and reported to the Insurance Departments of the several states its financial condition upon a cash receipts and cash disbursement basis as distinguished from what is known as a report on a revenue or accrual basis. A cash account reports the cash received and disbursed during the year, while a revenue or ac-

172 crual account takes into consideration the items becoming due and unpaid in each year. Premiums, cash dividends, cash surrender values, matured endowments, death losses, and similar items are entered by plaintiff on its books on a cash basis when received or paid and were so entered during the year 1913.

But keeping its books on what is called a cash basis does not mean that the Company actually received or actually paid out the full sum shown by its account books. For example, if a beneficiary entitled to be paid $10,000 as a death loss desired, as in many cases they did, to leave the sum payable
173 to her with the Company to draw interest, the Company would not actually pay her the $10,000 and then receive it back from her, but would debit death losses with $10,000 and credit her with $10,000 held at interest. Or if a dividend were payable on a policy upon which a premium was payable and the insured desired to apply the dividend toward the payment of the premium, the Company would debit dividends with the amount and receive from the insured the difference between the amount of the dividend and the amount of the premium and credit premiums with the full amount of the premium, and made many other similar entries on its books.

174 The foregoing does not apply to the various reserves and certain liability items which are not kept as running cash accounts but are kept in separate books and are made up for the year in the accounting made at the end of each year.

NEW YORK LIFE INSURANCE COMPANY,
By JAMES H. MCINTOSH,
Its Attorney.

WILLIAM H. EDWARDS,
By WM. HAYWARD,
United States District Attorney,
His Attorney.

Exhibit 1.

175

PROTEST

OF THE

NEW YORK LIFE INSURANCE COMPANY.

NEW YORK, 5 August, 1918.

To the Honorable

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of the State of New York.

176

SIR:—

New York Life Insurance Company on the 25th day of July, 1918 received from you notice and demand for taxes on your "Form 1-17A", which was, and is, in words and figures following, to-wit,—

"ORIGINAL

"TREASURY DEPARTMENT.
U. S. INTERNAL REVENUE.
FORM 1-17A.

177

NOTICE AND DEMAND FOR TAX AND RECEIPT—
CORPORATION INCOME TAX.

Collector's Office 2nd,
District of New York.

At Custom House B'ldg. Date July 24th, 1918

Notice is hereby given that there has been assessed against you the amount set opposite as a tax on corporation net income. Demand is here

Form 23A 1918 Apr. 7 2
Form 23A 1918 Apr. 7 27
(Year) (Month)
(Folio) (Line)
For period ended
Dec. 31st, 1913

178 made for the payment of said tax on or before the due date given below. Failure to do so will cause a 5 per cent. penalty to accrue with interest at 1 per cent per month from due date until paid.

TAXES, PENALTIES, ETC.

Amount of tax $97,739.93
50 per cent. penalty. ...
100 per cent penalty ...
5 per cent penalty.. ...
Total $97,739.93

Due date Aug. 5th, 1918 Received payment,

WILLIAM H. EDWARDS
Collector of Internal Revenue.

179

NEW YORK LIFE INS. CO.
346 B'way,
City.

Collector of Internal Revenue.

This notice and demand must be presented at the time payment is tendered, as when properly stamped "paid" by the collector it becomes a receipt for taxes. Disregard all previous notices. See instructions on back."

180 The instructions on the back of said notice are as follows:

"Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should also be borne in mind that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly. Collectors can not receive in payment of taxes uncertified checks, per-

sonal checks, drafts, or vouchers, and all in- 181
dorsements by collectors on certified checks are made without recourse. MONEY ORDERS AND CERTIFIED CHECKS MUST BE MADE PAYABLE TO THE COLLECTOR OF INTERNAL REVENUE."

Compelled thereto by your statement in said notice and demand that failure to pay on or before the 5th day of August, 1918, will cause a 5% penalty to accrue with interest at 1% per month from the due date until paid, said Company now here pays said demanded sum of Ninety-seven Thousand Seven Hundred Thirty-nine Dollars and Ninety-three Cents ($97,739.93), but pays it involuntarily 182
and under protest for that said tax is both erroneously and illegally, as well as unjustly, assessed, and is excessive in amount, and the whole and every patr thereof is wrongfully collected, and said Company now here demands refund and repayment of the sum so paid and notifies you that unless its said demand is complied with said Company will resort to every recourse provided by law for the recovery of the same.

Said New York Life Insurance Company is an insurance company, being a corporation duly organized and existing under and by virtue of the 183
laws of the State of New York for the purpose of and engaged in the business of making insurance upon lives and all and every insurance pertaining to life on the purely mutual plan without any shares of capital stock, having its chief offices and place of business in the City of New York, in said State of New York, in the Second Internal Revenue District of said State, and said tax has been assessed against it pursuant to what is claimed to be an amendment and correction of the return made by said Insurance Company in the year 1914 under

184 the act of October 3, 1913 entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government and for other Purposes", and particularly that part of said act known as Section II G (*a*) (*b*) (*c*) and (*d*).

But said New York Life Insurance Company says that on, to-wit, the 26th day of February, 1914, said Company duly made and filed with the Collector of Internal Revenue for said district on Form 1030, duly furnished it by the Treasury Department for that purpose, return of its net income received during the calendar year ending December
185 31, 1913, and full, true and correct return under oath of its President and Treasurer, therein setting forth all the facts required by said act, as well as all facts called for by said form, therein and thereby truly and accurately stating and showing, pursuant to said act, the entire net income of said corporation arising or accruing from all sources during the calendar year ending December 31, 1913, a copy of which said return is hereto attached, marked Exhibit A and made a part hereof.

Said tax return shows, and the fact is, that the entire net income of said corporation arising or accruing from all sources during the calendar
186 year ending December 31, 1913, pursuant to the terms of said act, was the sum of Ten Million Fifty-seven Thousand Eight Hundred Fifty-seven Dollars and Forty Cents ($10,057,857.40), and no more.

Said collector duly received said return and forthwith transmitted the same to the Commissioner of Internal Revenue, and there was thereupon duly assessed a federal income tax against said insurance company of One Hundred Thousand Five Hundred Seventy-eight Dollars and Fifty-seven Cents ($100,578.57) upon said entire net in-

come arising or accruing from all sources during 187
said year ending December 31, 1913, which said income tax of One Hundred Thousand Five Hundred Seventy-eight Dollars and Fifty-seven Cents ($100,578.57) said insurance company on the 26th day of June, 1914 duly paid.

Thereafter the Honorable the Commissioner of Internal Revenue on, to-wit, the 20th day of June, 1918, pretended to amend and correct said insurance company's said return by comparing said Company's said return with the report made by said Company to the Insurance Department of the State of New York for its business for the year ending December 31, 1913, as is shown by his March 28, 188
1917 letter, in which he said,—

> (Same as hereinbefore printed in paragraph No. Eight, page 32.)

and as is further shown by his June 20, 1918 letter, in which he said,

> (Same as hereinbefore printed in paragraph No. Eight, page 34.)

Said Company's said report to the Insurance Department of the State of New York was not made 189
in accordance with said Act of October 3, 1913, nor in accordance with any accountancy system of said Company, nor in accordance with any recognized accountancy system, but was made in response to the requirements of said Insurance Department and upon blank forms prepared by said Department, which it required said Company to fill up and file with it. The items which composed said alleged amendment and correction of said return as they were contained in said Annual Report were, as we

190 are informed and believe, in substance and effect, as follows,—

Under the heading "Income" in said report,—	
Item 36. Commissions advanced in previous years now repaid....	$28,309.97
Item 38. Doubtful debts recovered	1,627.61
Item 39. Bonuses received for repayment or extension of mortgage loans	5,756.56
Item 42. Gross profit on the sale or maturity of ledger assets.....	163,221.18
191 Under the heading "Disbursements" in said report,—	
Item 10. Dividends paid to policyholders in cash or applied in liquidation of loans or notes..	9,292,939.49
Under the heading "Liabilities, Surplus and Other Funds" in said report,—	
Item 9*a*. Increase in present value of future premiums waived on account of total and permanent disability	16,629.00
192 Item 14. Increase in reserve for net Death-losses incurred but unreported	250,000.00
Item 43. Increase of reserve for Nylic contracts	151,641.00
Total	$9,910,124.81
Less under the heading "Income"—	
Item 22. Dividends left with the	

Company to accumulate at interest	$95,881.82		193
Net amount ..	$9,814,242.99		
Plus deductions made by the Company in its return but disallowed by the Government under the heading "Disbursement" in said report.			
Item 48. Gross decrease by adjustment in book value of ledger assets..	332,466.72		194
Making total added to taxable income		$10,146,709.71	
Less portion of cash dividends allowed June 20, 1918		372,717.00	
Leaving balance		$9,773,992.71	195

But no item forming a part of said alleged amendment and correction constituted a part of the taxable income received by said Company during the year ending December 31, 1913 because,—

1. Said items 36 and 38 were not income. They were debts collected.

2. Said item 39 was not income but was the sum received as consideration for accepting anticipated payment of mortgage loans.

196 3. Said item 42 was not income but was profits on the sale of ledger assets during the year.

4. Said Item 10 under "Disbursements", namely, "Dividends paid to policyholders in cash or applied in liquidation of loans or notes"—$9,292,939.49, said Company did not include as a part of its said return because said act provides that "Life insurance companies shall not include as income in any year such portion of any actual premiums received from any individual policyholder as shall have been paid back or credited to such individual policyholder or treated as an abatement of premium of
197 such individual policyholder within such year", and said sum consisted of actual premiums received from individual policyholders of the Company which were paid back to policyholders in cash or applied in liquidation of loans or notes within said year 1913 and no part thereof ever was income of the insurance company.

5. Said Item 9*a* under the heading "Liabilities, Surplus and Other Funds" contained in said report, constituted an actual loss on account of the waiver of premiums and was the reserve required
198 by law to be carried to meet said liabilities.

6. Said liability Items 14 and 43 were increase of reserve required by law to meet the Company's liabilities.

7. Said disbursement Item 48 "Gross decrease by adjustment in book value of ledger assets" was an actual loss sustained by the Company on account of the approaching maturity of some of its assets which were purchased at a premium.

Said insurance company objects to said alleged amendment and correction and to each and every

item thereof, and says that said amendment and 199
correction and each and every item thereof is erroneous, illegal, unjust and wrongful, and said Company pays said sum of Ninety-seven Thousand Seven Hundred Thirty-nine Dollars and Ninety-three Cents ($97,739.93) involuntarily and under protest for that said additional tax, and each and every part and item thereof, is both erroneously and illegally, as well as unjustly and wrongfully, assessed, is excessive in amount, and is wrongfully collected.

Said company now here demands refund and repayment of said sum and of each and every said part and item thereof and gives notice that unless 200
its said demand is complied with said Company will resort to every recourse provided by law for the recovery thereof.

NEW YORK LIFE INSURANCE COMPANY,

[CORPORATE SEAL]

By

(s) JOHN C. McCALL

Second Vice-President.

Attest:

SEYMOUR M. BALLARD

Secretary.

201

202 **Exhibit 2.**

TREASURY DEPARTMENT,
U. S. INTERNAL REVENUE.
Form 46—Revised March, 1918.
Ed. 150,000.

CLAIM FOR REFUND.

TAXES ERRONEOUSLY OR ILLEGALLY COLLECTED

ALSO AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS.

203

IMPORTANT.
This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor.

Date of filing to be plainly stamped here.

STATE, COUNTY AND CITY OF NEW YORK. } ss:

New York Life Insurance Company of 346 Broadway, in the City of New York, State of New York, by John C. McCall, its Second Vice-President,
204 makes this its claim for refund of taxes erroneously and illegally collected, and the said John C. McCall, being duly sworn, according to law, deposes and says, that said New York Life Insurance Company is a corporation, that he is Second Vice-President of said corporation and authorized by it to make this claim and affidavit, and that this claim is made on behalf of said claimant, and that the facts stated below with reference to said claim are true and complete, to wit,—

1. The business engaged in by claimant is that of life insurance, said New York Life Insurance

Company being a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at No. 346 Broadway, in the City of New York, in said State of New York, in the Second Internal Revenue District of said State, said Company transacting said business on the purely mutual plan without any shares of capital stock. 205

2. The character of the assessment or tax for which claim for refund is now made was an additional income tax assessed against said corporation for the year ending December 31, 1913. 206

3. The amount of said assessment, refund of which is claimed, is the sum of $97,739.93.

4. The amount now asked to be refunded is the sum of $97,739.93.

5. The date of payment of said assessment was, to-wit, August 5, 1918.

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the several reasons following, to-wit,— 207

(*a*) On, to-wit, the 26th day of February, 1914, said claimant duly made and filed with the Collector of Internal Revenue for said district on Form 1030, duly furnished it by the Treasury Department for that purpose, a full, true and correct return under oath of its President and Treasurer, of its net income received during the calendar year ending December 31, 1913, therein and thereby setting forth all the facts required by that act of

208 October 3, 1913, entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government and for Other Purposes", as well as all facts called for by said form, and therein and thereby truly and accurately stated and showed, pursuant to said act, the entire net income of said corporation arising or accruing from all sources during the calendar year ending December 31, 1913. A copy of which said return is hereto attached marked Exhibit A and made a part hereof. (Said Exhibit A is the same as that hereinbefore printed in paragraph No. Third, page 27.)

209 (*b*) Said tax return showed, and the fact was, that the entire net income of said corporation arising or accruing from all sources during the calendar year ending December 31, 1913, pursuant to the terms of said act, was the sum of $10,057,857.40, and no more.

(*c*) Said Collector duly received said return and forthwith transmitted the same to the Commissioner of Internal Revenue, and thereupon there was duly assessed a federal income tax against said claimant of $100,578.57 upon said entire net income arising or accruing from all sources during
210 said year ending December 31, 1913, which said income tax said claimant duly paid on the 26th day of June, 1914.

(*d*) Thereafter and on, to-wit, the 20th day of June, 1918, the Honorable, the Commissioner of Internal Revenue, pretended to amend and correct said claimant's said return by comparing said complainant's said return with the report made by it to the Insurance Department of the State of New York, of its business for the year ending December 31, 1913, as is shown by said Commis-

sioner's March 28, 1917, letter to said claimant, as 211
follows, to-wit,—

(Same as hereinbefore printed in paragraph No. Eight, page 32.)

and as is further shown by his June 20, 1918 letter, in which he said,—

(Same as hereinbefore printed in paragraph No. Eight, page 34.)

(*e*) But said claimant further says that its said Report to the Insurance Department of the State of New York was not made under or in accordance with said Act of October 3, 1913, nor in accordance 212
with any accountancy system of said claimant, nor in accordance with any recognized accountancy system; but was made in response to the requirements of said Insurance Department upon blank forms prepared by said department, which said department required said claimant to fill up and file with it, for the special purpose of testing the legal solvency of said claimant.

(*f*) The items which composed said alleged amendment and correction of said return, and are the basis of said additional tax, as they were contained in said annual report were, and are, as we 213
are informed and believe, in substance and effect as follows:

Under the heading "INCOME" in said report:

Item 36. Commissions advanced in previous years now repaid....	$28,309.97
Item 38. Doubtful debts recovered.	1,627.61
Item 39. Bonuses received for repayment of extension of mortgage loans	5,756.56
Item 42. Gross profit on the sale or maturity of ledger assets.....	163,221.18

214 Under the heading "DISBURSEMENTS" in said report

Item 10. Dividends paid to policyholders in cash or applied in liquidation of loans or notes..	9,292,939.49

Under the heading "LIABILITIES, SURPLUS and OTHER FUNDS" in said report:

Item 9*a*. Increase in present value of future premiums waived on account of total and permanent disability	16,629.00
215 Item 14. Increase in reserve for net Death-Losses incurred but unreported	250,000.00
Item 43. Increase of reserve for Nylic contracts	151,641.00
Total	$9,910,124.81

Less under the heading "Income":

Item 22. Dividends left with the company to accumulate at interest	95,881.82
216 Net amount	$9,814,242.99
Less portion of cash dividends allowed June 20, 1918	372,717.00
Plus deduction made in your claimant's said return but disallowed by the Commissioner consisting of Decrease by Adjustment in Book Value of Ledger Assets	332,466.72
Leaving balance	$9,773,992.71

(*g*) But no item forming a part of said alleged amendment and correction constituted a part of

the taxable income received by said claimant dur- 217
ing the year ending December 31, 1913, for that,—

(1) Said Item 36, namely, "Commissions advanced in previous year now repaid, $28,309.97," on account of which an additional tax of $283.10 was assessed and collected and said Item 38, namely, "Doubtful debts recovered, $1627.61," on account of which an additional tax of $16.28 was assessed and collected, were each items of capital account and consisted of debts due to the claimant which it succeeded in collecting during the year 1913.

(2) Said Item 39, namely, "Bonuses received for 218
repayment or extension of mortgage loans, $5,-756.56," on account of which an additional tax of $57.57 was assessed and collected was not income but was a sum received by the claimant as consideration for accepting payment of mortgage loans before the due date of the mortgage debt.

(3) Said Item 42, namely, "Gross profit on the sale or maturity of ledger assets, $163,221.18," on account of which an additional tax of $1,632.21 was assessed and collected was not income but was profits earned by the claimant on the sale of capital 219
assets during said year.

(4) Said Item 10, under the heading "Disbursements" in said report, namely, "Dividends paid to policyholders in cash or applied in liquidation of loans or notes, $9,292,939.49", from which was deducted $372,717.00 as "Portion of Cash Dividends now allowed", leaving a balance of $8,920,222.49 on account of which an additional tax of $89,202.22 was assessed and collected was not income, but was an aggregate sum made up of several small items, which consisted of portions of actual premiums re-

220 ceived from individual policyholders of your claimant, which were paid back or credited to said individual policyholders or treated as an abatement of premium of said individual policyholders within said year 1913, and in this behalf your claimant further says that,—

A life insurance company transacting its business on the mutual, level premium plan, which is the plan upon which your claimant transacts its business, requires its policyholders to pay in advance an estimated sum which is known to be greater in the aggregate then will be the actual
221 needs of the Company,—the overpayments to be accounted for by the Company to its policyholders after experience has shown what were its actual needs.

For the purpose of annually ascertaining the amount of such overpayments, Article VIII of your claimant's charter provides as follows,—

> "As soon as practicable after the thirty-first day of December each year, the officers of said corporation shall cause a statement to be made of the true state of its affairs, and shall well and truly ascertain the surplus earned by it during said year."

222

When the amount of the over-payments made by the policyholders is ascertained at the end of each year, the Company disposes of it in one or the other of two ways, for the benefit of the policyholders who paid it,—either (1) by equitably apportioning it among them and at once paying it back or crediting it or treating it as an abatement of their several premiums; or (2) by crediting it to the policyholders as a class who paid it, accumulating it, and returning it to the survivors of the class on the respective dates stated in their several policies.

The first of these ways of disposing of these over- 223
payments is commonly called the annual dividend plan, the second is commonly called the deferred dividend plan.

Your claimant has transacted its business on both of these plans. During the calendar year 1913, the aggregate sums returned to its members whose policies were on the annual dividend plan was, to wit, the sum of $5,803,612.18; and the aggregate sum returned to its members whose policies were on the deferred dividend plan was, to-wit, the said sum of $9,292,939.49.

Your claimant did not in its said return include as income either one of said aggregate sum, because 224
said act provides,—

> "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement of premium of such individual policy holder, within such year;"

This entire sum of $9,292,939.49 was paid back or credited to individual policyholders of your claimant, or treated as an abatement of their prem- 225
iums, within the year 1913, on account of previous over-payments or premiums; and therefore, like the said sum of $5,803,612.18, it was not included in its said return as income of said Company for said year 1913.

Your claimant is advised that the Treasury Department disapproves the failure to include said sum of $9,292,939.49 as income except to the extent of $372,717.00, on the ground that the several items of premium payments which constitute said aggregate were not paid back or credited to, or treated

226 as an abatement of premium of, such individual policyholders within the same year that your claimant received said sums from them. But this same objection obtains to each and all of the several items which constitute the aggregate sum paid back to, credited, or treated as an abatement of premium of the annual dividend policyholders; for no premium is ever received by this or any other company, the amount of the over-payment ascertained, and the excess paid back, credited, or treated as an abatement of premium, all in the same year. The premium in every such case is received in one year,
227 and the excess ascertained and accounted for *in a subsequent year.*

Moreover, the amount of the estimated premium paid in advance by your claimant's deferred dividend policyholders on the one hand and by its annual dividend policyholders on the other is the same for all policies of the same class and equal expectation of life. Therefore the annual over-payments of each are the same. The annual over-payments of the deferred dividend policyholders are each year credited to those policyholders. The credit could yearly be made to each individual policyholder. Some companies transacting a de-
228 ferred dividend business so credit it. But your claimant has not kept its books this way because it thought it involved unnecessary bookkeeping. Its way of keeping its books has been annually to credit the over-payments made the preceding year by its deferred dividend policyholders to those policyholders as a class, and to pay each year out of this fund the equitable share of it belonging to each policyholder who has paid his premiums and whose dividend period matures that year. This entire sum of $9,292,939.49 was made up of portions and their accumulations of actual premiums

received from individual policyholders whose poli- 229
cies were on the deferred dividend plan, which were paid back or credited to such individual policyholders, or treated as an abatement of their premiums, within the year 1913.

The Department's construction discriminates between corporations of the same kind and class; and it bases its discrimination either on the forms of insurance contracts these corporations of the same kind and class make, or on the way they keep their books.

But the law at best unintentionally discriminates against life insurance companies which have outstanding deferred dividend policies. At the com- 230
mencement of the year 1913, your claimant's aggregate sum to the credit of its deferred dividend policyholders was $85,142,216.00. On this fund your claimant, during the year 1913, received an interest income of about $4,000,000.00, which forms a part of the net income of your claimant contained in its said return and on which it paid an income tax. If your claimant's outstanding policies had all been on the annual dividend plan, it would not have had this accumulated sum of $85,142,216.00, nor would it have received any part of this interest income of about $4,000,000.00, and its net taxable income for 231
said year would have been reduced about $4,000,000.00 accordingly.

To this income tax derived from an interest earning of about $4,000,000.00 during 1913 on deferred dividend funds, which tax your claimant has paid and no part of which would be payable if all its policies were on the annual dividend plan, shall there now be added a further income tax on $8,920,222.49, not one dollar of which was or is income, or would be claimed to be income, if all your claimant's policies were on the annual dividend plan?

232 But it will be said the sums returned to deferred dividend policyholders are not all over-payments of premiums, but contain an element of accumulated interest. Suppose they do, does this alter the case? The entire sum resulted from the over-payment of premiums; and Congress intended that life insurance companies should not include such sums as income.

The Committee of Congress which added to the income tax bill this clause stating that life insurance companies should not include as income sums derived from over-payment of premiums, said, in
233 reporting the amendment, that the amendment placed life insurance companies on the same footing as marine companies; and on this assurance Congress adopted the amendment. Now if life companies and marine companies were intended to be put on an equality, what does the law say about marine companies? It says "That mutual marine insurance companies shall include in their return of gross income gross premiums received by them, less amounts paid for reinsurance, *but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest*
234 *paid upon such amounts between the ascertainment thereof and the payment thereof.*"

Thus are marine companies expressed directed to deduct amounts repaid as "premiums previously paid by them and interest paid upon such amounts." How can mutual life companies be on the same footing as marine companies unless they also deduct, or, what is the same thing, do not include as income, amounts repaid as "premiums previously paid by them and interest paid upon such amounts?"

Moreover, as I have already shown, all the in- 235
terest which has been added to the premiums returned to the deferred dividend policyholders was subject to an income tax, and such tax was duly paid on account of it for the year in which your claimant received the interest.

The Federal Court was right on this subject when the Court held in the late case of *Penn Mutual Life* v. *Lederer*, 247 Fed., 559, that—

> "A mutual life insurance company, limiting premiums to actual cost, but exacting the advance payment of an estimated reasonably safe maximum premium, and returning the excess 236
> after the actual cost is shown, is entitled to exclude from its gross premiums the amounts so paid to policy holders, though there have been some accretions by way of interest or other profit, and though the statute forbids the taxable income to be reduced by dividend payments, as the word 'dividend' merely means a unit portion of something which has been divided, and does not necessarily include the thought of profit, and the dividends referred to are not to be deducted because they have once been excluded."

237

We submit, therefore, that your claimant in making its said return properly did not include as income any part of this item of $9,292,939.49, and that the entire amount of taxes on account of said sum, less $372,717.00, to-wit, a tax of $89,202.22 now exacted from, and paid by, your claimant under protest on account of said item is erroneously and illegally assessed and collected, and should be refunded.

(5) Said Item 9*a* under the heading "Liabilities, Surplus and Other Funds" in said report, namely,

238 "Increase in present value of future premiums waived on account of total and permanent disability, $16,629," on account of which an additional tax of $166.29 was assessed and collected is not income but is a net addition required by law to be made and was made within the year to reserve funds, and is an increase in reserve set aside as required by law for the purpose of meeting the Company's insurance contracts.

(6) Said Item 14 under the heading "Liabilities, Surplus and Other Funds," in said report namely, "Increase in reserve for net death losses incurred
239 but unreported, $250,000," on account of which an additional tax of $2,500 was assessed and collected is not income but is a net addition required by law to be made and was made within the year to reserve funds, and is an increase in reserve set aside as required by law for the purpose of meeting the Company's insurance contracts.

(7) Said Item 43 under the heading "Liabilities, Surplus and Other Funds" in said report, namely, "Increase of reserve for Nylic contracts, $151,641" on account of which an additional tax of $1,516.41 was assessed and collected was a net addition re-
240 quired by law to be made within the year to reserve funds and was not income.

(8) In making its said return your claimant included as a deduction an item of $332,466.70 which constituted a loss actually sustained within the year and not compensated by insurance or otherwise in this, that certain securities owned by your claimant it had purchased above par and as their maturity approached it sustained annually a loss on these securities purchased above par because of the approach of the period when your claimant would receive only par for them; and the

aggregate amount of the annual loss thus sustained 241
on said securities purchased by your claimant above par was said sum of $332,466.70. By disallowing this sum as an item of deduction said Commissioner thereby increased the amount of your claimant's said additional tax in the sum of $3,324.67, which forms a part of said total tax paid.

Said several items of additional taxes aggregated the sum of $98,698.75, but in amending and correcting said claimant's said return, as aforesaid, said Commissioner of Internal Revenue credited said claimant with a deduction which consisted of an item in said claimant's said annual report under the heading "Income" as follows,— 242

Item 22 "Dividends left with the Company to accumulate at interest, $95,881.82" on account of which said credit as a deduction there was taken from said aggregate amount of said additional tax the sum of $958.82, thus leaving the net additional tax collected from your claimant, the sum of $97,739.93.

And this deponent now claims that by reason of the premises said New York Life Insurance Company is justly entitled to have said sum of $97,739.93 refunded and to have refunded to it each and every said item which when added together make 243
up said sum of $97,739.93 hereinafter specifically stated and said Company now here asks and demands return of the same.

Said Tax was duly paid under protest and the original Collector's receipt therefor is hereto attached and marked Exhibit B. (Said Exhibit B is the same as that Form 1-17A which is printed as a part of the foregoing Exhibit 1, p. 59.)

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever and that no claim has here-

244 tofore been presented, except as stated herein, for the refund of the whole or any part of the amount of said Item 3.

JOHN C. MCCALL

Subscribed in my presence and sworn to before me this 6th day of September, 1918.

IDA TAYLOR
Notary Public.

[NOTARIAL SEAL]

Exhibit 3.

245 TREASURY DEPARTMENT,
U. S. INTERNAL REVENUE,
Form 46—Revised March, 1918.
Ed. 150,000.

AMENDMENT TO CLAIM FOR REFUND OF INCOME

TAXES ERRONEOUSLY OR ILLEGALLY COLLECTED FOR THE YEAR ENDING DECEMBER 31, 1913

ALSO AMOUNTS PAID FOR STAMPS USED IN ERROR EXCESS.

246

IMPORTANT.

This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor.

Date of filing to be

plainly stamped here.

STATE, COUNTY AND CITY OF NEW YORK } ss:

New York Life Insurance Company of 346 Broadway, in the City, County and State of New York, by Thomas A. Buckner, its Vice-President, makes

and files this its amendment to its claim for refund 247
of income taxes erroneously and illegally collected for the year ending December 31, 1913, and the said Thomas A. Buckner, being duly sworn according to law, deposes and says that on, to-wit, the 6th day of September, 1918, said New York Life Insurance Company filed in the office of the Collector of Internal Revenue for the Second District of New York its claim for refund of taxes erroneously or illegally collected as an additional income tax against said New York Life Insurance Company, a life insurance corporation of the State of New York, for the year ending December 31, 1913, and as further ground for the refund of the 248
said taxes says,—

That portions of actual premiums received from its several individual deferred dividend policyholders were credited to such individual policyholders, within said year 1913, in several sums which aggregate the sum of $8,189,918, no part of which said sum of $8,189,918 should be included as income in said year 1915.

WHEREFORE said New York Life Insurance Company prays that this statement may be received and accepted as an amendment to its said claim for refund filed as aforesaid in the office of the 249
Collector of Internal Revenue for the Second District of New York, on the 6th day of September, 1918, and that said taxes may be refunded accordingly.

THOMAS A. BUCKNER

Subscribed in my presence and sworn to before me this 23rd day of June, 1919.

IDA TAYLOR
Notary Public.

[SEAL]

Exhibit 4

CLAIM FOR REFUND.

TAXES ERRONEOUSLY OR ILLEGALLY COLLECTED.

ALSO AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS.

Date of

plainly

DEPARTMENT, ... REVENUE. ... 1920. ... 200,000

New York } ss:
New York }

IMPORTANT.
This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor.

New York Life Insurance Company
(Name of claimant.)

346 Broadway, New York City
(Address of claimant; give street and number as well as city or town, and State.)

deponent being duly sworn according to law deposes and says that this claim is made on beh named above, and that the facts stated below with reference to the claim are true and complete:

ss engaged in by claimant Life Insurance

er of assessment or tax Additional income tax for 1913
(State for or upon what the tax was assessed or the stamps affixed.)

t of assessment ~~XXXXXX~~ $ 97 739

t now asked to be refunded (or such greater amount as is legally refundable) $ 97 739

f payment of assessment or purchase of stamps 5 August 1918

mant verily believes that the amount stated in Item 4 should be refunded and claimant now refund of said amount for the following reasons:

which are stated in the Company
al claim for refund filed September 5th, 1918, more fully state
Amendment to said claim for refund which is hereto attached a
herewith.

this deponent further alleges that the said claimant is not indebted to the United States in any and that no claim has heretofore been presented, except as stated herein, for the refunding of t rt of the amount stated in Item 3.

n to and subscribed before me this 26th Signed:

[illegible] 1920 [illegible] NEW YORK LIFE INSURANCE

TREASURY DEPARTMENT.
U. S. INTERNAL REVENUE.
Form 46—Revised March, 1918.
Ed. 150,000. 253

SECOND AMENDMENT TO CLAIM FOR REFUND OF INCOME

TAXES ERRONEOUSLY OR ILLEGALLY COLLECTED FOR THE YEAR ENDING DECEMBER 31, 1913

ALSO AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS.

IMPORTANT.

This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor.

Date of filing to be plainly stamped here. 254

STATE, COUNTY and CITY OF NEW YORK. } ss:

New York Life Insurance Company of 346 Broadway, in the City, County and State of New York, by Thomas A. Buckner, its Vice-President, makes 255
and files this its second amendment to its claim for refund of income taxes erroneously and illegally collected for the year ending December 31, 1913, and the said Thomas A. Buckner being duly sworn according to law deposes and says that on, to wit, the 6th day of September, 1918, said New York Life Insurance Company filed in the office of the Collector of Internal Revenue for the Second District of New York its claim for refund of taxes erroneously or illegally collected as an additional income tax against said New York Life Insurance

256 Company, a life insurance corporation of the State of New York, for the year ending December 31, 1913.

In said claim for refund said Company asked for the refund of $89,202.22 because a part of said additional tax was based on the dividends paid during said year to the Company's deferred dividend policyholders aggregating $9,292,939.49, less the sum that year deducted from the dividends paid the deferred dividend policyholders on account of premiums payable by such policyholders that year and aggregating $372,717.

257 But in the case of *Penn Mutual Life Insurance Co.* v. *Lederer,* decided April 19, 1920, the United States Supreme Court has held that the clause in the Federal Income Tax Law which provides that life insurance companies "shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back * * * to such policyholder * * * within such year" did not apply to dividend payments made at the end of the deferred dividend period to deferred dividend policyholders during the taxable year. Therefore New York Life Insurance Company now here

258 abandons its said claim for refund on account of dividends paid at the end of the deferred dividend periods during the taxable year to deferred dividend policyholders and in lieu thereof makes claim for the refund of $81,899.18 on account of the annually ascertained and credited over payments of premiums made by all deferred dividend policyholders within the taxable year, the sum so credited during the year 1913 aggregating the sum of $8,189,918, and corresponding to the over-payments made by annual dividend policyholders which were paid back or credited or treated as an abatement of premium within the taxable year.

The Company is entitled to this refund because 259
$8,189,918 constitutes the aggregate of such portions of actual premiums received from individual policyholders as were credited to such policyholders within the taxable year 1913, which the law expressly says life insurance companies shall not include in gross income. This will be clear to you when I explain how the several credits arise which constitute this aggregate sum, to-wit,—

1. Said New York Life Insurance Company is a purely mutual company without any shares of capital stock, transacting the business of life insurance on the level premium, mutual plan. 260

2. Every policyholder in a level premium mutual life insurance corporation is a member of the corporation and is entitled to receive his insurance at cost. The ideal way of giving members of a mutual company their insurance at cost would be to collect from them just the sum that each member ought to pay as his share of the outlay of the mutual enterprise. But this plan is impracticable because obviously it would require the company to incur the outlay before it could ascertain each member's exact share, and, unless each and all promptly paid, the company would find itself short of funds 261
to meet its debts. Hence this ideal plan of each insured paying once and for all exactly the cost of his insurance is not in use because it is not practicable.

3. The practical way in which the business is done requires each insured to pay in advance an estimated sum, called a premium, which the company's actuaries calculate will certainly meet the member's proportionate share of the company's outlay. The member who thus pays in advance an esti-

262 mated sum understands that at the end of the year when the amount of the company's outlay for the year is known, the company will account for all in excess of actual cost, and this is the practice of all companies doing business on the mutual plan.

4. The annually ascertained over-payment, commonly but erroneously called a dividend, the company accounts for to each insured. If the policy said nothing about the disposition to be made of it, the company would be bound, under well settled equitable rules, at once to return it to the insured who paid it. But the policy as a rule provides for
263 the disposition of it.

5. Two plans are in use for disposing of these annually ascertained over-payments. One plan is called the annual dividend plan, the other the deferred dividend plan. The two plans are the same in all respects, except that the contract of the member whose policy is on the annual dividend plan gives him greater latitude in the disposition of his annually ascertained over-payments than does the contract of the member whose policy is on the deferred dividend plan. This is so because:

264 (*a*) The premiums or estimated cost of insurance which each member pays in advance, are calculated precisely the same whether the policy is on the annual or on the deferred dividend plan; and they are identical in amount for each insured of the same class and equal expectation of life for an equal amount of insurance.

(*b*) As there is no difference in the sources of the sums to be accounted for, so also is there no difference in the method of accounting for them except that the policy contract of one reserves to the policyholder optional forms of disposing of his annually

ascertained over-payments, while the other's con- 265
tract gives him no such option.

A representative form of a so-called annual dividend policy is hereto attached marked Exhibit A and made a part hereof. By it you will notice the policyholder has reserved to himself the option of disposing of his annually ascertained over-payment in any one of five ways; that is, he may require the company,—(1) to pay it back to him in cash; or (2) to apply it toward the payment of premiums; or (3) to apply it to the purchase of participating paid-up additions to the sum insured; or (4) to credit it and accumulate it at interest; or (5) if it is an endowment policy, to apply it to shorten the 266
maturity of the contract as an endowment; or if it is a limited premium payment policy, to apply it to reduce the number of premiums payable.

A representative form of a so-called deferred dividend policy is hereto attached marked Exhibit B and made a part hereof. By it you will notice the policyholder reserves no such option as does the policyholder under the other form of contract, for in taking a deferred dividend policy he in effect has agreed in advance to have his annually ascertained over-payments *credited only*. If he survives the tontine or deferred dividend period of the 267
policy, the then value of the credit annually made to him, with interest accumulations, and with in addition his proportionate share of the annually ascertained over-payments of the other policyholders of his class whose policies were not then in force will be paid to him. If he does not survive the tontine or deferred dividend period and keep his policy in force, then his annually ascertained and credited over-payments will be divided among those of his class who did.

268 Thus on all policies an estimated sum is paid by the insured annually in advance. The actual cost of insurance is annually ascertained and accounted for. Under some policies the insured has reserved to himself optional methods of disposing of his annually ascertained over-payments, while under another form—the so-called deferred dividend policy—he has reserved no such option, but all annually ascertained over-payments are to be credited only.

6. If it be said that the deferred dividend policyholder's annually ascertained overpayment is not
269 credited to him because the company does not keep a ledger account with him in which an entry of this credit is annually made on its books, the numerous answers are as obvious as they are conclusive,—

(*a*) The question of taxability or non-taxability under this law does not depend on how the taxpayer keeps his books.

United States *v.* Nipissing Mines Co., 202 Fed., 803, p. 804.

United States *v.* Guggenheim Exploration Co., 238 Fed., 231, p. 236.

270 Southern Pac. Ry. Co. *v.* Meunter, 260 Fed., 837, p. 838.

Sargent Land Co. *v.* Von Baumbach, 207 Fed., 423, p. 432.

Baldwin Locomotive Works *v.* McCoach, 215 Fed., 967, p. 971.

Von Baumbach *v.* Sargent Land Co., 219 Fed., 967, p. 971.

Baldwin Locomotive Works *v.* McCoach, 221 Fed., 59.

Mitchell Brothers Co. *v.* Doyle, 225 Fed., 437, p. 440.

Forty Fort Coal Co. *v.* Kirkendall, 233 Fed., 704, p. 707. 271

Doyle *v.* Mitchell Brothers Co., 235 Fed., 686, p. 692.

Alpha Portland Cement Co. *v.* United States, 261 Fed., 339, p. 340.

(*b*) Some companies, such as the Northwestern and the National Life of Vermont, actually enter on their books a ledger credit to each individual policyholder of the amount of his ascertained over-payment for the year. But because one company keeps its books this way and another does not, shall this differentiate their tax liability? 272

(*c*) Each individual policyholder receives the credit whenever at the end of each year the company ascertains the amount he over-paid for the year, no matter how the company keeps its books. Nor need the sum so credited be segregated from the company's other funds and held separately for each such policyholder; it may be merged in the aggregate of all sums so held. The over-payment of an annual dividend policyholder which he leaves with the company to accumulate at interest is not held separately but is merged in the aggregate of all sums so held. Does this change its character as a credit? The credit in each case is the sum the individual policyholder over-paid for the year, and is held in a general fund on account of his policy and as a credit to him. 273

(*d*) From each premium, the company takes (1) the policy's share of the policy payments for the year, (2) the sum required to increase the reserve on the policy, (3) the policy's share of expense of management, including losses on investment, if any, and (4) returns or credits the balance as an

overpayment. The reserve on each policy which the premiums paid on it create is not carried as a ledger credit to the policy, it is carried in a general fund just as are these over-payments;—but for this reason would any insurance man say a reserve was not credited each year to each individual policyholder as a part of the premium he paid that year? Where does the money come from when the insured borrows on his policy or receives a surrender value in cash or in paid-up or continued insurance? It comes from this reserve made up from his premiums, but carried, not as a ledger credit, but as a part of a general fund in which each insured's share is credited and the amount of the credit always definitely known. In precisely the same way are these over-payments credited and carried in a general fund, and the amount of the credit is definitely known at any given time just as is the amount of the reserve held on the policy.

7. But it may be claimed that these over-payments are not credited because the policy-holder may die or lapse his policy before the time comes to return to him these over-payments accumulated with interest with an added "share of the forfeitures" of other policyholders of his class. Here again the answers are numerous and conclusive,—

(*a*) The insured's premium contained the overpayment just as it contained credit to the reserve. The annual payment to the reserve was taken out of the premium and credited; so also was the overpayment. Does the credit thus made lose its character as a credit because it may be lost or forfeited by something which subsequently happens? Under the old forms of policies, the insured forfeited his entire reserve if he lapsed his policy. Under the most up-to-date contract, he may forfeit a part of

his reserve if he lapses his policy. But shall we say the policyholder did not each year receive credit for the adition that year made to the reserve on his policy out of the premium he paid because something might thereafter happen which would forfeit his reserve in whole or in part? If not, then shall we say the policyholder did not each year receive credit for the addition that year made to his over-payments out of the estimated premium he paid in advance because something might thereafter happen which would forfeit his over-payments? 277

(*b*) The so-called annual dividends are in certain cases subject to forfeiture precisely as are the annually ascertained and credited over-payments of deferred dividend policyholders; but has anyone ever for a moment thought that such annual dividends are for this reason to be included in gross income and taxed? 278

Some annual dividend policies provide that the annually ascertained over-payment of premium may be applied to reduce the number of premiums or to make the policy mature as an endowment. Under this provision of the contract,—

(1) If the policy is a limited payment life policy which by its terms becomes fully paid for when, say, twenty annual premiums are paid, the annually ascertained over-payments may be credited and used to reduce the number of premiums to be paid. That is, whenever the number of premiums paid plus the accumulated annual over-payments become the mathematical equivalent of twenty annual premiums, the insured will then be fully paid up. Thus may the twenty payment life policy be paid for by, say, seventeen annual premiums plus the accumulated annual over-payments 279

280 credited. But if the insured dies before the premiums paid plus the accumulated over-payments become the mathematical equivalent of twenty annual premiums, the insured receives nothing for his credited over-payments, precisely as the deferred dividend policyholder receives nothing for his credited over-payments if he dies before the end of the accumulation period.

(2) The same is true when the over-payments are used to shorten the endowment period. An insured whose policy is on, say, the twenty-five year endowment plan may leave his annual over-pay-
281 ments to accumulate, and apply the accumulations to shorten the endowment period, thus maturing his policy as an endowment in twenty-one or twenty-two years,—whenever the premiums paid plus the accumulated annual over-payments are the mathematical equivalent of twenty-five annual premiums. But if the insured dies before the premiums paid plus the accumulated over-payments become the mathematical equivalent of twenty-five annual premiums, the insured receives nothing for his credited over-payments just as in the case of the deferred dividend policyholder under similar conditions.

282 In each of these cases the annual dividend is credited; but whether the insured will ultimately receive from the company the benefit of the sum credited to him, depends—as in the case of the deferred dividend policy—on whether or not he lives.

In its Regulations the Department has very properly recognized that these credits to annual dividend policies for the purpose of reducing the number of premium payments or shortening the endowment period but which are subject to forfeiture and which the policyholder may never receive, are por-

tions of actual premiums received from individual 283
policyholders which are credited to such policyholders, by stating in Article 549 that "'credited to' means held to the credit of, including dividends held * * * to shorten the endowment or premium paying period".

(*c*) A borrowed from B one thousand dollars and gave him for it his note in which A promised to pay B one thousand dollars ten years after date with 5% interest compounded annually provided B was then living, otherwise to X, Y and Z. By this transaction did not B have a credit with A? If not, why not? Certainly he had a credit, a val- 284
uable credit, which B could at any time sell and assign in the market. Not perhaps as readily or for as high a price as a credit not subject to be lost, but none the less a credit.

Suppose you deposit a sum of money in the bank and the bank agrees to hold and accumulate it and return it to you on a fixed future date if you are then living, together with your proportionate share of other persons who made similar deposit but died before the date for accounting, would you by such deposit have no credit in the bank? If the money you thus deposited was not a credit to you, what
was it? What was the relation between you and 285
the Bank? Was it not the same as any depositor the relation, namely, of creditor and debtor? Were you not credited by the bank with a sum of money which it received from you and which it was under contract obligation to return to you if you were living, or to pay to another if you were not living, on or agreed date?

Just so are these annual over-payments made by policyholders. When the amount of their over-payments is ascertained at the end of each year and the contract is that the company shall hold the over-

286 payments to an agreed date, the policyholder becomes a depositor with the company to the extent of the ascertained over-payments; these deposits are actually credited, and must ultimately be returned to the policyholder unless, in accordance with the terms of the contract under which he made the deposit, it goes to the other like creditors of his class because of the happening of a condition subsequent, namely, his death or the lapse of his policy before the date agreed upon for repayment to him. The over-payment is the policyholder's property the title to which is vested in him, subject, however, to be divested by the happening of a condition subse-
287 quent.

We are not here asking the Department to overrule the Supreme Court on a question of law. On the contrary, what we are now asking is not only consistent in every way with the decision of the Supreme Court in the Penn Mutual case, but is suggested by the opinion of the court in that case. The court there said,—"It is the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the policyholder. * * * There is a striking difference between an aggregate of individual pre-
288 miums each reduced by means of dividends and an aggregate of full premiums from which it is sought to deduct amounts paid out by the company which have no relation whatever to premiums received within the tax year but which relate to some other premiums which may have been received many years earlier".

Therefore we now here abandon the attempt "to deduct amounts paid out by the company which have no relation whatever to premiums received within the tax year", and, treating deferred dividend policies precisely as we treat annual dividend

policies deduct from "the aggregate of individual premiums received within the tax year the aggregate amount of the over-payments made for the year by each individual deferred dividend policyholder and credited to such policyholder," thus giving to the statute a construction not only consistent with the decision of the Supreme Court but which that decision suggests. 289

In the Penn Mutual case the court held that the company must include in gross income the aggregate amount of the dividends paid to deferred dividend policyholders within the taxing year. The sum not included in income for 1913 on this account was $9,292,939.49. We concede that in view of the 290
Supreme Court's decision this sum which the Company in its return did not include in gross income is now properly included therein. What we are now claiming the right not to include in gross income is,—not as in the Penn Mutual case the aggregate of sums paid, but a totally different sum not there discussed at all, namely, the annually ascertained over-payments of annual premiums on deferred dividend policies which are credited within the taxable year and aggregated for the year 1913 $8,189,918, on account of which the Company is entitled to the return of $81,899.18. 291

And said Company further says that it is not indebted to the United States in any amount whatever and that no claim has heretofore been presented except as stated herein for the refund of the whole or any part of the amount of said tax.

THOMAS A. BUCKNER

Subscribed in my presence and sworn to before me this 26th day of May, 1920.

IDA TAYLOR
Notary Public

[NOTARIAL SEAL]
RWW

292 **Exhibit A attached to and forming a part of the foregoing Exhibit 4.**

Annual Dividend Policy.

(Page 1 of Policy.)

[SPECIMEN COPY]

NEW YORK LIFE INSURANCE COMPANY

BY THIS POLICY OF INSURANCE AGREES TO PAY

Dollars

293 at the Home Office of the Company in the City and State of New York to beneficiar , with right of revocation, upon receipt at said Home Office of due proof of the death, during the continuance of this contract of the Insured.

This contract is made in consideration of the first premium of Dollars, the receipt of which is hereby acknowledged, constituting payment for the period terminating on the day of in the year Nineteen Hundred and , and the payment of a like sum on said date and on the

294 day of in every year thereafter during the continuance of this Policy, until the death of the Insured; but after one full annual premium has been paid, the Company, by endorsement on this Policy, will waive payment of premiums under the conditions stated in Section 7 on the next page, entitled "Waiver of Premiums".

THIS POLICY SHALL PARTICIPATE IN THE SURPLUS OF THE COMPANY.

The proportion of divisible surplus accruing on this Policy shall be ascertained and distributed an-

nually and not otherwise, and at the option of the Insured shall each year, on the anniversary of the Policy, be either 295

(1) Paid in Cash; or,

(2) Applied toward the payment of any premium or premiums; or,

(3) Applied to the purchase of participating Paid-up Additions to the Policy; or,

(4) Left to accumulate to the credit of the Policy, with compound interest at the rate of three per centum per annum, and payable at the maturity of the Policy, but withdrawable on any anniversary of the Policy. 296

Unless the Insured shall elect otherwise within three months after the mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of participating Paid-up Additions (Option No. 3) which may be surrendered for cash at any time, and the Cash Value thereof shall not be less than the original cash dividend.

The benefits and provisions printed or written by the Company on the following pages, are a part of this contract as fully as if they were recited at length over the signatures hereto affixed. 297

After delivery of this Policy to the Insured, it takes effect as of the day of Nineteen Hundred and .

IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be

298 signed this day of Nineteen Hundred and

DARWIN P. KINGSLEY,
President.

SEYMOUR M. BALLARD,
Secretary.

Examined,

.....

.....

Registrar.

Age .....: Insurance payable at death: Premiums
299 payable during life: Annual dividend.

910-404.

(Page 2 of Policy.)

BENEFITS AND PROVISIONS.

1. THE CONTRACT.—This Policy is free of conditions as to residence, travel or occupation. The Policy constitutes the entire contract between the parties, and no agent is authorized to waive forfeitures or to make, modify or discharge contracts, or to extend the time for paying a premium.

300 2. INCONTESTABILITY.—This Policy shall be incontestable after one year from its date of issue except for non-payment of premium.

3. SELF-DESTRUCTION.—Self-destruction during the first policy year, whether the insured be sane or insane, is a risk not assumed by the Company; but in such case the Company will return the premiums actually received.

4. AGE.—If the age of the Insured has been misstated the amount payable hereunder shall be such

as the premium paid would have purchased at the correct age. 301

5. PAYMENT OF PREMIUMS.—All premiums are payable at the Home Office of the Company or to an agent of the Company upon delivery of a receipt, on or before the date due, signed by an Executive Officer of the Company, namely, the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer, and countersigned by said agent. The premium is always considered as payable annually, in advance, but by agreement in writing and not otherwise may be made payable in semi-annual or quarterly payments. 302 Any unpaid premiums required to complete the payments for the current policy year in which death occurs shall be deducted from the amount payable hereunder. The payment of a premium shall not maintain the policy in force beyond the date when the next payment is due, except as hereinafter provided.

6. GRACE.—A grace of one month (not less than thirty days) subject to an interest charge of five per centum per annum will be allowed for the payment of every premium after the first, during which time the insurance shall continue in force. If 303 death occurs within the period of grace the unpaid premium for the then current policy year shall be deducted from the amount payable hereunder.

7. WAIVER OF PREMIUMS.—The Company, by endorsement hereon, will waive payment of the premiums thereafter becoming due, if the insured, before attaining the age of sixty years and after paying at least one full annual premium and before default in the payment of any subsequent premium, shall furnish proof satisfactory to the Company that he has become wholly and perman-

304 ently disabled by bodily injury or by disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit, or from following any gainful occupation. Any premiums so waived shall not be deducted from the sum payable under the Policy, and the values provided for in Section "12, Cash Loans", and Section "15, Benefits on Surrender or Lapse", shall be the same as if such premiums had been paid in cash. Provided that, notwithstanding proof of disability may have been accepted by the Company as satisfactory, the Insured shall at any time, on demand, furnish the
305 Company satisfactory proof of the continuance of such disability; and if the Insured shall fail to furnish such proof, or if it shall appear to the Company that the Insured is able to perform any work or to follow any occupation whatsoever for compensation, gain or profit, all premiums thereafter due must be paid in conformity with this contract.

Without prejudice to any other cause of disability, the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands above the wrists, or of both feet above the ankles, or of
306 one entire hand and one entire foot will be considered as total and permanent disability within the meaning of this provision.

8. CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the Insured, if there be no existing assignment of the Policy made as herein provided, may, while the Policy is in force, designate a new beneficiary, with or without reserving right of revocation, by filing written notice thereof at the Home Office of the Company accompanied

by the Policy for suitable endorsement thereon. 307
Such change shall take effect when endorsed on the Policy by the Company and not before. If any beneficiary shall die before the Insured, the interest of such beneficiary shall vest in the Insured.

9. PRIVILEGE OF CHANGE TO OTHER FORMS OF POLICIES.—At any time, and while in full force, and provided the Insured is then less than 60 years of age, this Policy may be changed without medical re-examination for a Policy of the same amount, upon any plan issued by the Company at the time this Policy takes effect and having a 308
higher rate of premium. Such change shall be effective upon payment of a sum equal to the difference between the premiums on the new Policy and the premiums paid on this Policy, with compound interest at the rate of five per centum per annum from the due date of each payment to the date when the change is made, and upon the surrender of this Policy. The new Policy will take effect as of the date of this Policy, and the premium will be based upon the same age as this Policy. The cash value of any dividends standing to the credit of this Policy, as well as any additional cash value of 309
such dividends that would have been credited under the new Policy may be used in the settlement of the difference of premiums.

10. REINSTATEMENT.—At any time after any default, upon written application by the Insured and upon presentation at the Home Office of evidence of insurability satisfactory to the Company, this Policy may be reinstated, together with any indebtedness in accordance with the loan provisions of the Policy, upon payment of arrears of premiums

310 with interest thereon at the rate of five per centum per annum.

11. ASSIGNMENT.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility as to the validity of any assignment.

12. CASH LOANS.—At any time after two full years' premiums have been paid and while this Policy is in full force, the Company will advance, on the pledge of the Policy and on the sole security thereof, an amount which, with interest thereon to
311 the end of the current policy year and with any unpaid portion of said year's premium, shall, at the option of the owner, be equal to or less than the Cash Surrender Value at the end of such policy year, including the Cash Surrender Value of any dividend additions. Interest on the loan will be at the rate of five per centum payable annually; if interest is not paid when due, it shall be added to the principal and bear interest at the same rate. Failure to repay any such advance or to pay interest shall not avoid this Policy unless the total indebtedness hereon to the Company shall equal its
312 Cash Surrender Value, nor until one month after notice of such fact shall have been mailed by the Company to the last known address of the Insured and of the Assignee of Record at the Home Office of the Company, if any, in which event the Policy shall become void.

13. PREMIUM LOANS.—Whenever the net loan value of this Policy shall be sufficient to pay one full annual premium with five per centum interest thereon for one year, the Company will, before the expiration of the days of grace, accept a pre-

mium lien note of the owners of the Policy in lieu 313
of cash for premium, said note to be a lien against the Policy and subject to the same terms and conditions as cash loans except that the Policy need not be deposited with the Company as a pledge. The total indebtedness on this Policy, however incurred, shall never exceed its Cash Surrender Value.

14. PAID-UP AND ENDOWMENT OPTIONS.—Whenever the reserve on this Policy together with the reserve on existing dividend additions, if any, at the end of any policy year shall equal or exceed the net single premium for the attained age of 314
the Insured by the American Experience Table of Mortality and interest at three per centum, for an amount of insurance equal to the face amount of this Policy, payable at the same time and under the same conditions as this Policy, the Company, at the written request of the Insured, will endorse the Policy as participating paid-up insurance for such amount as the said reserve will purchase when thus applied, any indebtedness to the Company to be a lien against said paid-up insurance upon the same terms and conditions as in Section 12 above; or, whenever said reserve at the end of any policy 315
year shall equal or exceed the face amount of this Policy, the Company, upon surrender of the Policy and all claims thereunder, will pay in cash the face amount of the Policy and any excess of said reserve, less any indebtedness to the Company on account of this Policy.

15. BENEFITS ON SURRENDER OR LAPSE.—After two full annual premiums shall have been paid, the owner may elect within three months after any default in payment of premium, but not later, either

316 (*a*) To accept the Cash Surrender Value; or,

(*b*) To have insurance for the face amount of this policy plus any dividend additions and less any indebtedness to the Company hereon continue in force from the date of default for such term as the Cash Surrender Value will purchase as hereinafter provided, but without future participation and without the right to loans or Cash Surrender Value; or,

(*c*) To purchase non-participating Paid-up Insurance payable at the same time and on the same conditions as this Policy. The Insured may at any
317 time obtain a loan on such Paid-up Insurance in accordance with the provisions contained in Section "12, Cash Loans", or surrender the Policy for its Cash Surrender Value.

THE CASH SURRENDER VALUE, after premiums have been paid for two years or more, will be the reserve on this Policy, and the reserve on any dividend additions thereto, at the date of default, computed according to the American Table of Mortality and interest at the rate of three per centum per annum, less the amount of any indebtedness to the Company, and less a surrender charge which in
318 no case shall be more than one and one-half per centum of the sum insured; after premiums have been paid for ten years or more there will be no surrender charge.

(Page 3 of Policy.)

BENEFITS AND PROVISIONS (*Continued.*)

THE TERM FOR WHICH SAID INSURANCE WILL BE CONTINUED, or the amount of PAID-UP INSURANCE will be such as said Cash Surrender Value will purchase as a net single premium at the age of the

Insured at the date of default according to the American Table of Mortality and interest at the rate of three per centum per annum. If the Insured shall not, within three months after default, surrender this Policy to the Company at the Home Office for its Cash Surrender Value as provided in option (*a*) or for paid-up insurance as provided in option (*c*), the insurance will be continued as term insurance as provided in option (*b*). 319

The figures contained in the following "Table of Loan and Surrender Values" represent the actual amounts available after deduction of the surrender charge, if any, and are computed in accordance with the above provisions and upon the assumptions that premiums have been paid in full for the number of years stated in the table, and that there is no indebtedness on the policy, and that there are no outstanding dividend additions. 320

TABLE OF LOAN AND SURRENDER VALUES.

The Cash Surrender, Loan and Paid-up Insurance values stated in the following table apply to a policy of $1,000. As this Policy is for $, the Cash Surrender Value and Loan Value (Col. 1), and the Paid-up Insurance (Col. 2), will be the amounts stated in the table; the periods of Continued Insurance (Col. 3) must not be multiplied or increased.

After Policy has been in Force	Column 1. Cash Surrender Value. Loan Value*.	Column 2. Paid-up Life Insurance.	Column 3. $ Insurance Continued For

321

Values for later years will be computed upon the above basis, and will be furnished on request.

*The Loan Values in the above table are the maximum amounts available at the end of the policy year indicated. Loans may also be obtained during the policy year as set forth in Section 12 entitled "Cash Loans".

322 16. MODES OF SETTLEMENT UPON DEATH OF INSURED.

If there be no existing assignment of the Policy made as herein provided, the Insured or in case the Insured shall have made no election, the Beneficiary after the Insured's death, may by written notice to the Company at its Home Office, elect to have the net sum payable under this Policy upon the death of the Insured paid either in cash or as follows:

(1) By the payment of interest at the rate of three per centum of such net sum, payable
323 one year after receipt and approval of proofs of death, and at the end of each year thereafter during the lifetime of the beneficiary and, unless otherwise directed in said notice, by the payment upon the death of the beneficiary of the said net sum, together with any accrued interest for the year then current, to the beneficiary's legal representatives or assigns.

(2) By the payment of equal annual instalments for a specified number of years, the first instalment being payable immediately, in ac-
324 cordance with the following Instalment Table, either to the beneficiary, or if there be more than one beneficiary, to the beneficiaries jointly and to the survivor.

(3) By the payment of equal annual instalments for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, the first instalment being payable immediately, in accordance with the following Instalment Table. If there be more than one beneficiary, the proceeds of this Policy, unless otherwise directed in said notice, shall

be considered as divided into equal parts. The amount payable to each such beneficiary shall be determined in accordance with the following Instalment Table for the ages attained by said beneficiaries. 325

Any instalments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

INSTALMENT TABLES.—Instalment payments under any option may be made annually, semi-annually, quarterly or monthly; the minimum basis of such payments will be $50 when paid annually, $25 when paid semi-annually, $15 when paid quarterly, or $10 when paid monthly, and the total of the fractional payments each year shall equal the annual payment each year as shown in the following tables, which are based upon a Policy, the proceeds of which are $1,000. The figures contained in the table will apply pro rata to this Policy. 326

Unless otherwise specified by the Insured or by the beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of instalments for the commuted value of the payments yet to be made, computed upon the same basis as Option (2) in the above table; provided that no such surrender will be made under (3) except after the death of the beneficiary occurring within the aforesaid twenty years. 327

The above Modes of Settlement are based upon an assumed interest earning of three per centum, but if in any year the Company shall declare for that year on funds held by it under such Modes of Settlement a greater interest rate than three per

centum, the sums payable under Options 1 and 2 and the instalments for the fixed period of twenty years under Option 3, shall be increased accordingly.

The above Modes of Settlement are not applicable if the beneficiary be a firm or corporation, nor if the net sum payable under the Policy shall be less than $1,000.

Exhibit B attached to and forming a part of the foregoing Exhibit 4

Deferred Dividend Policy.

(Page 1 of Policy.)

NUMBER AMOUNT

NEW YORK LIFE INSURANCE COMPANY

BY THIS POLICY OF INSURANCE,

IN CONSIDERATION of the agreements, statements, representations and warranties submitted to its Officers at the Home Office, in the City of New York, in the written Application for this Policy, which are hereby referred to and made a part of this Contract, and in further consideration of the sum of.....Dollars and.....Cents, to them in hand paid, at the Office of the Company, in the City of New York (being the premium for two years' term insurance), and of the annual payment of..... .....Dollars and..... Cents (being the life premium), to be paid at said Office on or before the.....day of..... ....., in every year during the continuance of this Policy, commencing on the.....day of.....189....

Age.

Annual Premium.

DOTH INSURE the life of..... $.....
of.....in the county of.....
State of.....(hereinafter called the insured), in the amount of.....
.....Dollars, commencing on the.....
day of.....189...., at noon.

AND THE SAID COMPANY DOTH HEREBY PROMISE AND AGREE to pay the amount of the said Insurance, at its Office in the City of New York, to
.....
.....
.....
Executors, Administrators, or Assigns, upon receipt and approval of proofs, as hereinafter required, of the death, during the continuance of this Policy, of the said insured, deducting therefrom all indebtedness to the Company, together with any balance of the year's premium remaining unpaid.

THIS POLICY is issued and accepted upon the following express Conditions and Agreements:

FIRST: If this Policy shall become a claim by death after having been in force two full years, the Company will not contest its payment on account of the incorrectness of any statement in the application, or in the accompanying declarations to the Medical Examiner (except in case of fraud), provided, however, that if the age of the insured is understated the amount of insurance payable shall be such proportion of the amount of the Policy as the premium paid bears to the required premium at the true age.

SECOND: That if any one of the premiums is not paid, as hereinafter provided, on or before the day when due, then this Policy shall become void, and all payments previously made shall remain the property of the Com-

pany, except that if this Policy shall lapse or become forfeited for the non-payment of any premium, after there have been paid thereon three full premiums as above specified (that is to say, the premiums for four years of insurance), a paid-up Policy will be issued, on demand made within six months after such lapse with surrender of this Policy, under the same conditions as this Policy, except as to payment of premiums, but without participation in profits (and without Mortuary-Dividend), for such an amount as the net Reserve on this Policy at the time of lapse, computed by the American Table of Mortality and interest at four and one-half per cent., after deducting all indebtedness to the Company, will purchase as a single premium at the present published rates of the Company, at the age of the insured at the time of lapse; and all right to any other paid-up Policy or surrender value, provided for by the statute of any State or country, is hereby waived.

ned.

.....

THIRD: That the provisions, requirements and benefits, printed or written by the Company, upon the next page of this Policy, are a part of this Contract, as fully as if they were recited at length over the signatures hereto affixed.

ombination
m and Life.

istribution
Policy.

ıary-Dividend.
92-42.

IN WITNESS WHEREOF, the said NEW YORK LIFE INSURANCE COMPANY has, by its duly authorized Officers, signed and delivered this Contract, this ..... day of ..... one thousand eight hundred and ninety-two.

JOHN A. MCCALL
President.

.....
Secretary.

(Page 2 of Policy.)

PROVISIONS, REQUIREMENTS AND BENEFITS REFERRED TO IN THIS POLICY.

Distribut Policy Provisio

THIS Policy is issued on the DISTRIBUTION POLICY PLAN, the particulars of which are as follows:

THAT the DISTRIBUTION PERIOD for this Policy shall be completed on the ..... day of .... in the year .....

THAT no dividend of surplus shall be allowed or paid upon this Policy, unless the insured shall survive until completion of its DISTRIBUTION PERIOD, and unless this Policy shall then be in force.

THAT surplus or profits derived from such Policies on the DISTRIBUTION POLICY PLAN as shall not be in force at the date of the completion of their respective DISTRIBUTION PERIODS, shall be apportioned among such Policies as shall complete the DISTRIBUTION PERIODS.

THAT after the completion of the DISTRIBUTION PERIOD, provided this Policy shall not have been previously terminated, this Policy shall secure to the insured one of the following benefits:

FIRST.—To apply the accumulated surplus apportioned by the Company to this Policy to the purchase of an Annuity on the life of the insured to be used in reduction of subsequent premiums on this Policy, and in case the amount accruing in any year from the Annuity shall exceed the amount of premium due thereon the excess to be paid in cash.

SECOND.—To continue the Policy for the original amount and withdraw in cash the accumulated surplus apportioned by the Company to this Policy.

340 THIRD.—To withdraw in cash the Entire Equity (that is, the net reserve, being .... Dollars and ..... Cents ($.....), and in addition thereto the accumulated surplus aforesaid).

FOURTH.—To convert the Entire Equity into a Paid-up Policy, without participation in profits, for an amount to be determined by the method then in use by the Company in determining Paid-up Policies of this class; provided that this Policy is legally surrendered
341 during the life-time of the insured, and within ninety days from the completion of the DISTRIBUTION PERIOD, and provided further that no Paid-up Policy shall be issued for any amount in excess of the original insurance, except upon a medical re-examination satisfactory to the Company.

FIFTH.—The conversion of the Entire Equity into a Life Annuity upon the life of and payable to the insured.

SIXTH.—To continue the Policy for the original amount and convert the apportioned sur-
342 plus into a Reversionary Addition conditioned upon satisfactory re-examination.

These benefits are at the option of the insured; but it is understood and agreed that, not less than three months prior to the completion of the DISTRIBUTION PERIOD, the said insured shall notify the Company, in writing, which benefit is selected; and that if no such notification shall be received, then, and in that case, the surplus apportioned to this Policy shall be applied to the purchase of an Annuity as stipulated in the "first benefit" named above.

THAT in the payment of premiums upon this Policy, falling due within the selected DISTRIBUTION PERIOD, a grace shall be allowed of one month; provided that in all cases when this grace is availed of, interest at the rate of six per cent. per annum shall be paid to the Company for the time deferred.

Dividends after Distribution Period.

IF this Policy is continued in force after the Distribution Period, surplus will be apportioned to it at the expiration of each period of five years thereafter. Such apportionments will be made in the form of reversionary additions; but the value of the same may, at the option of the insured, be taken in cash, or applied to the reduction of premiums during the next five-year period, or to the permanent reduction of all future premiums. When the value is taken in cash, payment shall be made to the insured, and his receipt shall be a valid release to the Company. Should the insured, however, at the completion of the Distribution Period, or at the end of any five-year period thereafter, request in writing that dividends be declared annually instead of at intervals of five years, the change so requested will be made, as regards subsequent dividends.

Surrenders after Distribution Period.

THIS Policy, if in force, may be surrendered to the Company at the expiration of any period of five years after the Distribution Period, upon thirty days' previous written notice. If so surrendered the entire reserve, at American four per cent., and in addition thereto the surplus then apportioned, will be allowed as a surrender value.

Premium Loans.

AFTER the premiums have been paid on this Policy for ..... years, the Company

will loan to the holder of the Policy (to enable him to continue it in force) the amount of any subsequent premium or premiums within the DISTRIBUTION PERIOD, as the same shall become due; provided interest at the rate of six per cent. per annum is paid annually in advance upon all such loans. The aggregate amount of any such loans and all interest accrued or unpaid upon the same shall be deducted from the proceeds of this Policy in any settlement of the Policy or of any benefit thereunder.

Mortuary Dividend.

IF this Policy shall become a claim by death occurring within the Distribution Period above specified, and subsequent to the ..... in the year Nineteen Hundred..... a Mortuary Dividend will be paid therewith, equal to the total amount of premiums (at the tabular annual rate) due on or after said date and paid, whether in cash or by premium loan, as above.

Risks not Assumed.

THIS Policy does not insure against death occurring while engaged in military or naval service in time of war, or in consequence of such service, nor against death in consequence of a duel or violation of law. In any such case the Policy shall be null and void; but on its surrender within six months thereafter, with satisfactory proofs of death, the net reserve (computed by the American Table of Mortality and interest at four and one-half per cent.), after deducting all indebtedness to the Company, will be paid therefor.

Powers of Agents.

No Agent has power in behalf of the Company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to issue a permit for residence,

travel or occupation, or to bind the Company by making any promise or receiving any representation or information. This power can be exercised only by the President, Vice-President, second Vice-President, Actuary or Secretary of the Company, and will not be delegated.

Payment of Premiums.

ALL premiums are due and payable at the Home Office of the Company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the President, Vice-President or Actuary, and countersigned by such agents. Notice that each and every payment of premium is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and any further notice required by any statute is hereby expressly waived. The giving of any other notice, or the acceptance of any premium after it is due, is to be considered as an act of courtesy only, and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payment of premiums thereafter due.

Notice When Due.

Proofs of Death.

PROOFS of death under this Policy shall be furnished to the Company at its office in the City of New-York within one year after death, and shall include sworn statements on the Company's forms, as follows: (1) a statement from each claimant; (2) a statement from each physician who attended the deceased within a year before death; (3) a statement from a responsible householder who knew the deceased; (4) a statement from the undertaker; (5) a statement from the clergyman, whenever one officiates; (6) a copy of the verdict and of the evidence on which it was based, duly certified, whenever an inquest has been held. All ques-

tions must be fully answered, and the omission of any of the answers or statements required must be satisfactorily explained or supplied by other proofs.

Assignments. ANY assignment of this Policy must be made in duplicate, and both copies must be sent to the Home Office for acknowledgment, one of them to be retained by the Company. Under no circumstances will the Company assume any responsibility for the validity of any assignment.

Survivorship

RATES ACCUMULATED WITH BENEFIT OF SURVIVORSHIP ON BASIS C. P. MORTALITY WITH INTEREST AT 4%. FOR APPORTIONMENT OF INTERIM SURPLUS.

Asset Share p taken at nea

Year of Issue 1905 Kind Life Oray. Dividend Class N. F. A

AGE	Share per M Dec. 31, 1909, Inc. 1910 Div.	6...Year Div. Rate per M, 1911	Share per M Dec. 31, 1910, Inc. 1911 Div.	7...Year Div. Rate per M, 1912	Share per M Dec. 31, 1911, Inc. 1912 Div.	8...Year Div. Rate per M, 1913	Share per M Dec. 31, 1912, Inc. 1913 Div.	9...Year Div. Rate per M, 1914	Share per M Dec. 31, 1913, Inc. 1914 Div.
21	959	2 85	1291	3 14	1664	3 40	2081	3 66	2547
22	979	2 94	1378	3 41	1760	3 48	2176	3 74	2698
23	1003	3 01	1350	3 26	1740	3 56	2176	3 82	2661
24	1026	3 08	1381	3 06	1781	3 64	2227	3 92	2724
25	1051	3 15	1414	3 44	1823	3 72	2281	4 01	2789
26	1077	3 23	1450	3 52	1869	3 82	2339	4 11	2860
27	1102	3 31	1484	3 61	1913	3 91	2394	4 21	2928
28	1131	3 39	1522	3 70	1964	4 01	2457	4 32	3004
29	1161	3 48	1562	3 80	2015	4 11	2671	4 43	3085
30	1193	3 58	1607	3 90	2073	4 22	2697	4 55	3171
31	1225	3 67	1650	4 01	2129	4 34	2766	4 68	3261
32	1261	3 78	1698	4 12	2190	4 46	2741	4 81	3356
33	1297	3 89	1747	4 24	2255	4 59	2822	4 95	3456
34	1336	4 00	1799	4 36	2321	4 73	2906	5 09	3556
35	1377	4 12	1855	4 50	2394	4 87	2998	5 25	3670
36	1419	4 25	1912	4 64	2468	5 02	3091	5 41	3787
37	1466	4 38	1974	4 78	2549	5 18	3192	5 58	3910
38	1514	4 53	2041	4 94	2635	5 36	3302	5 76	4046
39	1566	4 68	2109	5 10	2724	5 53	3413	5 96	4183
40	1620	4 84	2183	5 26	2820	5 72	3536	6 16	4336
41	1678	5 01	2263	5 46	2924	5 92	3668	6 38	4497
42	1741	5 19	2347	5 66	3033	6 13	3804	6 61	4667
43	1807	5 38	2437	5 87	3151	6 36	3954	6 85	4853
44	1876	5 58	2532	6 09	3275	6 60	4117	7 11	5046
45	1948	5 80	2629	6 33	3401	6 86	4274	7 38	5251
46	2030	6 03	2741	6 58	3547	7 13	4459	7 68	5481
47	2113	6 28	2855	6 85	3697	7 42	4650	7 99	5723
48	2204	6 54	2979	7 13	3859	7 72	4856	8 32	5978
49	2301	6 84	3111	7 44	4034	8 06	5081	8 67	6263
50	2404	7 14	3252	7 76	4220	8 40	5317	9 05	6562
51	2518	7 48	3409	8 16	4427	8 77	5583	9 45	6896
52	2635	7 76	3569	8 46	4632	9 17	5854	9 88	7246
53	2761	8 12	3744	8 86	4870	9 59	6156	10 33	7616
54	2897	8 50	3932	9 27	5119	10 04	6476	10 82	8023
55	3046	8 90	4137	9 72	5394	10 52	6803	11 33	8458
56	3203	9 34	4355	10 19	5683	11 04	7213	11 89	8971
57	3373	9 80	4589	10 69	5998	11 58	7622	12 48	9505
58	3557	10 30	4847	11 24	6344	12 17	8081	13 11	10102
59	3755	10 83	5123	11 81	6719	12 80	8577	13 78	10707
60	3970	11 39	5427	12 43	7131	13 47	9127	14 50	11471
61	4201	12 00	5754	13 09	7581	14 18	9727	15 27	12256
62	4450	12 65	6107	13 80	8067	14 95	10385	16 10	13127
63	4723	13 34	6496	14 56	8601	15 77	11117	16 99	14095
64									

DEND RATES ACCUMULATED WITH BENEFIT OF SURVIVORSHIP ON BASIS C. P. MORTALITY
ITH INTEREST AT 4½. FOR APPORTIONMENT OF INTERIM SURPLUS.

Asset Share per M taken at nearest $

r of Issue *Kind* *Dividend Class*

re per M 31, 1909, 1910 Div.	Year Div. Rate per M, 1911	Share per M Dec. 31, 1910, inc. 1911 Div.	Year Div. Rate per M, 1912	Share per M Dec. 31, 1911, inc 1912 Div.	Year Div. Rate per M, 1913	Share per M Dec. 31, 1912, inc 1913 Div.	Year Div. Rate per M, 1914	Share per M Dec. 31, 1913, inc 1914 Div.	Prem. Re per A

And thereupon, James H. McIntosh, being first 361
duly sworn as a witness for the plaintiff, testified as follows,—

The Witness: During the year 1909, and subsequent thereto, including the year 1918, I was General Counsel of the New York Life Insurance Company, the plaintiff. As such general counsel I had charge of making out the Company's tax returns to the Federal Government. In none of said returns was there deducted as a loss any part of the sums collected as shown by and referred to in the 21st paragraph of the Agreed Statement of Facts in this 362
case.

CROSS-EXAMINATION BY MR. CRAWFORD:

Q. I understand from your statement that you were actively engaged as counsel for the insurance company during 1909 to 1912? A. Yes, sir.

Q. And in your capacity as attorney you had active charge of the preparation of the corporation excise tax returns of the plaintiff? A. I had.

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Q. And you state as a matter of positive knowledge that in none of the corporation excise tax returns during any of those years, from 1909 to 1912, did the company make any deduction on account of these advances to agents? A. I do.

Mr. Crawford: No further questions.

364 Thereupon both sides rested and the plaintiff there and then requested the Court to give the jury the several instructions following,—

First Instruction Requested by the Plaintiff:

The jury is instructed to render a verdict for the plaintiff for $81,899.18 on account of the item referred to and described in paragraph VIII(*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts with six per cent interest thereon from August 5, 1918.

But the Court refused to give this instruction
365 and the plaintiff there and then excepted.

Second Instruction Requested by the Plaintiff:

The jury is instructed that portions of actual premiums received by the plaintiff from its several individual policyholders whose policies were on what is known as the deferred dividend plan were credited to such individual policyholders during said taxing year in the aggregate sum of $8,189,918 which should not have been included as income for said year; but the Commissioner of Internal Revenue included them, and assessed and collected from
366 the plaintiff on account thereof accordingly the sum of $81,899.18 which forms a part of the total tax complained of and the plaintiff is entitled to recover from the defendant said sum of $81,899.18 with interest thereon at six per cent per annum from the 5th day of August, 1918.

But the Court refused to give this instruction and the plaintiff there and then excepted.

Third Instruction Requested by the Plaintiff:

The jury is instructed that a portion of a premium credited to the individual policyholder who

paid it to the plaintiff does not mean that the company must keep a debit and credit ledger account with each insured to entitle itself to the benefits of the non-inclusion clause contained in the law. If a policyholder paid his premium and the company credited him on its records with the amount of the payment and the account taken in the taxing year disclosed that he over-paid for the previous year and shows the amount of the over-payment, than that constituted a credit to him for the sum over-paid. 367

But the Court refused to give this instruction and the plaintiff there and then excepted. 368

FOURTH INSTRUCTION REQUESTED BY THE PLAINTIFF:

A credit was made to an individual policyholder if the account taken in the taxing year disclosed that he over-paid his previous annual premium and if the company so kept its records as to show at all times the amount of such over-payment.

But the Court refused to give this instruction and the plaintiff there and then excepted.

As soon as the plaintiff had finished making its several foregoing requests for instructions, the defendant there and then moved the Court for the direction of a verdict on the whole case and with respect to each and every item at issue therein, and for the dismissal of the plaintiff's complaint in its entirety. 369

Thereupon, after oral argument of counsel, the Court instructed the jury as follows,—

370 **Charge of the Court.**

Gentlemen of the jury, the Court instructs you to return a verdict for the defendant on that claim of the plaintiff for $81,899.18 which is referred to and described in paragraph VIII(*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts.

To which charge of the Court the plaintiff there and then excepted.

And the Court further instructs you to return a verdict for the plaintiff on all the other items at issue in the said cause except said item referred to
371 and described in paragraph VIII(*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts, and to assess its damages in the principal sum of $7,880.47 with interest thereon from August 5, 1918, amounting to $3,007.71, making a total of $10,888.18.

To which charge of the Court the defendant there and then excepted.

The foregoing two paragraphs were the whole of the charge of the Court.

Pursuant to the instructions of the Court as aforesaid the jury duly returned a verdict accord-
372 ingly.

And now, in furtherance of justice and that right may be done, said plaintiff, and said defendant each tenders and presents the foregoing Bill of Exceptions and prays that the same may be settled, allowed, signed and sealed by the Court and made a part of the record in said cause, and forasmuch as said Bill of Exceptions contains all the evidence, exhibits, rulings of the Court and the whole of the charge to the jury given and the several requests to charge refused and the several

exceptions of each of the parties upon the trial of 373
this action, the same is now here settled, signed and sealed and allowed by me accordingly and ordered to be made a part of the record in said cause this 19th day of December, 1924.

JULIAN W. MACK,
Judge.

Stipulation Settling Bill of Exceptions.

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It is stipulated that the foregoing Bill of Exceptions contains all the evidence, exhibits, rulings of the Court and the whole of the charge to the jury given and the several requests to charge refused and the several exceptions of each of the parties upon the trial of this action and may be settled and ordered to be filed and annexed to the judgment roll herein.

New York, December 19, 1924.

JAMES H. MCINTOSH,
Attorney for Plaintiff,

375

WILLIAM HAYWARD,
United States Attorney,
Attorney for Defendant.

376 **Opinion of the Court.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second Internal Revenue District of the
377 State of New York,
Defendant.

JAMES H. MCINTOSH, Attorney for Plaintiff;

WILLIAM HAYWARD, United States Attorney, Attorney for Defendant;

THOMAS J. CRAWFORD, Assistant U. S. Attorney.

FOREST D. SIEFKIN, Special Attorney, Bureau of Internal Revenue,
Of Counsel.

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MEMORANDUM OPINION.

MACK, *Circuit Judge:*

The plaintiff, a mutual life insurance company organized under the laws of the State of New York and operated on the mutual level premium plan, sues to recover the sum of $89,705.33, alleged to have been erroneously assessed and collected for the year 1913, under the provisions of Section II, G (*a*) (*b*), of the Revenue Act of 1913, 38 Stat. 114 172, 173, the pertinent portions of which appear

in the footnote X. The principal facts have been 379
stipulated.

1. The plaintiff contends that $81,899.18 of the amount of the tax in question was erroneously assessed by reason of the fact that the Commissioner

X "That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; * * *"

"Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint-stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and 380
necessary expenses paid within the year in the maintenance and operation of its business and properties including rentals or other payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any; and in the case of mines a reasonable allowance for depletion of ores and all other natural deposits, not to exceed 5 per centum of the gross value at the mine of the output for the year for which the computation is made; *and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts.* PROVIDED, That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policy- 381
holders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves. PROVIDED, *further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof, and *life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year.*"

382 of Internal Revenue refused to permit the plaintiff to exclude or deduct from its income the sum of $8,189,918.00 which plaintiff had ascertained to be the amount of overpayments of premiums made during the year 1912 by the plaintiff's deferred dividend policyholders. By a mathematical calculation plaintiff had ascertained the amount of overpayments made by each deferred dividend policyholder on each $1,000.00 of insurance for each year of issue on each insurance plan and at each age of issue. This rate of overpayment per $1,000.00 of insurance for each year of issue on each insurance plan and at each age of issue was recorded on a
383 special sheet for each policyholder, and these sheets were bound together, each year of issue in a separate volume. Plaintiff did not actually calculate from the rate of overpayment thus shown in respect of each policy the amount of overpayments made by any individual deferred dividend policyholder, nor did it refund any of these overpayments to its policyholders during the year 1913. All the overpayments in question were made in respect of deferred dividend policies which had not reached maturity during the year 1913. What the plaintiff did was to carry the overpayments in an account
384 designated in its annual report to the State Insurance Department as "Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies."

Under the plaintiff's deferred dividend policy, as is customary with that kind of policy, no dividend is allowed or paid to the insured until the completion of the distribution period stated in the policy and unless the policy shall be in force at such time. The policy provides that upon the completion of the distribution period, the surplus or

profits derived from such deferred dividend policies 385
as may be permitted by their respective holders to lapse shall be apportioned among such deferred dividend policyholders whose policies are then in force; that is, a holder of a deferred dividend policy may lose by forfeiting to the other members of his class the annually ascertained overpayments of premium made by such holder either by permitting his policy to lapse or by dying before the completion of the accumulation period stated in his policy. On the other hand, the holder who survives the distribution period and keeps up his policy receives the annually ascertained overpay- 386
ments of premiums with accumulated interest and his proportionate share of the overpayments with interest made by holders of the same class who did not survive or who permitted their policies to lapse. The Company as such and its policy holders not in the same class gain nothing by such lapses or forefeitures.

The sum of $8,819,918.00 which the plaintiff contends should be deducted from its income for the year 1913, represents the total amount of the overpayment of premiums calculated by it to have been made by its deferred policyholders in the year 1912. There is, we believe, nothing in the record to show 387
which deferred policyholders, if any, of those making the overpayments in 1912, paid premiums to the plaintiff in the year 1913.

In *Penn. Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523, the Supreme Court held that money derived by a mutual company from redundancy of premiums in previous years, and paid to policyholders during the tax year as dividends in cash, not applied in abatement or reduction of their current premiums, could not be deducted from premium receipts in computing gross income. Mr.

388 Justice Brandeis analyzed the apparent purpose of Congress in enacting the provisions of the Revenue Act of 1913 in question, reviewed the history of Section II, G (*b*) of that Act and explained the reasons that may have actuated and justified Congress is providing a different rule for the treatment of redundant premiums in the three different classes of mutual insurance recognized by the Act, to wit, mutual fire, mutual marine and mutual life insurance. In answering the argument that the nature of life insurance dividends is the same, whatever the disposition made of them, and that Congress could not have intended to relieve the com-
389 panies from taxation to the extent that dividends are applied in payment of premiums and to tax them to the extent that dividends are not so applied, Mr. Justice Brandeis stated (pp. 530-533):

> "If Congress is to be assumed to have intended, in obedience to the demands of consistency, that all dividends declared under life insurance policies should be treated alike in connection with income taxation regardless of their disposition, the rule of consistency would require deductions more farreaching than those now claimed by the company. Why allow so-
> 390 called non-inclusion of amounts equal to the dividends paid in cash but not applied in reduction of renewal premium and disallow so-called non-inclusion of amounts equal to the dividends paid by a credit representing amounts retained by the company for accumulation or to be otherwise used for the policyholders' benefit? The fact is, that Congress has acted with entire consistency in laying down the rule by which in computing gross earnings certain amounts only are excluded; but the company has failed to recognize what

the principle is which Congress has consistently applied. The principle applied is that of basing the taxation on receipts of net premiums, instead of on gross premiums. The amount equal to the aggregate of certain dividends is excluded, although they are dividends, because by reason of their application the net premium receipts of the tax are to that extent less. There is a striking difference between an aggregate of individual premiums, each reduced by means of dividends, and an aggregate of full premiums, from which it is sought to deduct amounts paid out by the company which have no relation whatever to premiums received within the tax year but which relate to some other premiums which may have been received many years earlier. The difference between the two cases is such as may well have seemed to Congress sufficient to justify the application of different rules of taxation. 391 392

"There is also a further significant difference. All life insurance has in it the element of protection. That afforded by fraternal beneficiary societies, as originally devised, had in it only the element of protection. There the premiums paid by the member were supposed to be sufficient, and only sufficient, to pay the losses which will fall during the current year; just as premiums in fire, marine, or casualty insurance are supposed to cover only the losses of the year or other term for which the insurance is written. Fraternal life insurance has been exempted from all income taxation; Congress having differentiated these societies, in this respect as it had in others, from ordinary life insurance companies. Compare *Supreme Council of the Royal Arcanum* v. *Behrend,* 247 393

394 U. S. 394. But in level-premium life insurance, while the motive for taking it may be mainly protection, the business is largely that of savings investment. The premium is in the nature of a savings deposit. Except where there are stockholders, the savings bank pays back to the depositor his deposit with the interest earned less the necessary expense of management. The insurance company does the same, the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit with interest; while the life insurance company under-
395 takes to pay to each member of a class the average amount (regarding the chances of life and death); so that those who do not reach the average age get more than they have deposited, that is, paid in premiums (including interest) and those who exceed the average age less than they deposited (including interest). The dividend of a life insurance company may be regarded as paying back part of these deposits called premiums. The dividend is made possible because the amounts paid in as premiums have earned more than it was assumed
396 they would when the policy contract was made, or because the expense of conducting the business was less than it was then assumed it would be or because the mortality, that is the deaths in the class to which the policyholder belongs, proved to be less than had then been assumed in fixing the premium rate. When for any or all of these reasons the net cost of the investment (that is, the right to receive at death or at the endowment date the agreed sum) has proved to be less than that

for which provision was made, the difference 397
may be regarded either as profit on the investment or as a saving in the expense of the protection. When the dividend is applied in reduction of the renewal premium, Congress might well regard the element of protection as predominant and treat the reduction of the premium paid by means of a dividend as merely a lessening of the expense of protection. But after the policy is paid up, the element of investment predominates and Congress might reasonably regard the dividend substantially as profit on the investment.

"The dividends, aggregating $686,503, which 398
the Penn Mutual Company insists should have been 'non-included', or more properly deducted, from the gross income, were, in part, dividends on the ordinary limited payment life policies which had been paid up. There are others which arose under policy contracts in which the investment feature is more striking; for instance, the Accelerative Endowment Policy or such special form of contract as the 25-year '6% Investment Bond' matured and paid March, 1913, on which the policyholder received besides dividends, interest and a 'share 399
of forfeitures'. In the latter, as in 'Deferred Dividend' and other semi-tontine policies, the dividend represents in part what clearly could not be regarded as a repayment of excess premium of the policy-holder receiving the dividend. For the 'share of the forfeiture' which he receives is the share of the redundancy in premium of other policyholders who did not persist in premium payments to the end of the contract period."

400 If the Company may not deduct from its income actual cash returns made to deferred dividend policyholders on account of the redundancy of the premiums, it would seem to follow that the Company should not be permitted to exclude from its income for the year the ascertained overpayments of premiums for the previous year or years when in the year in question neither was cash returned to the policyholders nor was any abatement or reduction made in the premiums paid by such policyholders during the year. If the actual cash return of the redundancy of the premiums as such may not be deducted by the Company, then a book-keeping
401 entry, which at best is but the equivalent of setting aside a fund to meet such cash returns to be made in the future, would seem to be entitled to no more favorable consideration.

It is argued that this interpretation of the Revenue Act of 1913 places a much heavier burden of taxation upon the interest of the deferred dividend policyholders than upon the annual dividend policyholders whose share in the redundancy of premiums, or more accurately, the redundancy of whose individual premiums is determined and paid annually either in cash or by way of abatement of
402 current premiums. But it should be pointed out that the dividends on the annual dividend policies are not deducted as dividends, but only by reason of the fact that the Company is, under the Revenue Act of 1919, entitled to exclude from its income such portion of any premium received from any individual policyholder as may have been paid back or credited to such individual within the year. If during the year no premium were received from the individual policyholder from which the dividend could be deducted, the dividend, it seems, would not be excluded in calculating the income of

the Company. To repeat, as the Supreme Court 403
pointed out in *Penn Mutual Life Insurance Co.* v. *Lederer, supra,* the Act of 1913 does not permit the deduction of dividends; it provides merely that the Company need not include as income such portion of any premium received in any year as shall have been paid back or credited any individual policyholder within that year. Whether and to what extent dividends which have become payable on deferred dividend policies may be deducted from premiums payable by such individual policyholder, it is not necessary now to decide. If the burden of taxation under the Revenue Act of 1913, as interpreted by the highest Court should be considered 404
to bear more heavily upon the deferred dividend policyholders than the annual dividend policyholders, that is an argument which may properly be addressed to the legislative branch.

2. Plaintiff further contends that $283.10 of the tax in question was erroneously assessed because the Commissioner of Internal Revenue refused to permit the plaintiff to deduct from its gross income commissions in the amount of $28,309.97 advanced to agents prior to 1906 (in which year the making of further advances was prohibited by the State of 405
New York and repaid or recovered in the year 1913.

It appears from the stipulation that these advances had, subsequent to 1906 and prior to January, 1913, been charged off by the Company as losses. Inasmuch as under the uncontradicted testimony it appears that these debts had been written off prior to the enactment of the Act of August 5, 1909, c. 6, Sec. 38, 36 Stat. 112, imposing a special excise tax upon corporations, including insurance companies, and that no benefit in respect of any deductions for losses on account of these debts had

406 been retained under any Federal tax law, the plaintiff should not be obliged to treat the amount of the repayment of these doubtful loans as income merely because it had prudently omitted some of its questionable assets from its balance sheet. Though a taxpayer cannot, while retaining the benefits accruing from the deduction of its bad debts in previous years, disclaim the burdens resulting from the inclusion of the somewhat unexpected repayment of these bad debts in subsequent years, yet if as in this case no such benefits have accrued, such repayments are properly to be treated as capital gains and not income.

407

3. It is a further contention of plaintiff that the Commissioner of Revenue erroneously refused to permit the plaintiff to deduct from its gross income the sum of $332,466.22, representing the amortization of the securities purchased by the plaintiff at a premium. The amortization was based on the actual purchase price and mathematically computed in and from the books of the plaintiff; it was not a revaluation of the securities to conform to market prices. Such amortization was not allowed as a deduction, under the Act of 1909, by the Circuit

408 Court of Appeals for the Seventh Circuit, in *Fink* v. *Northwestern Mutual Life Insurance Co.,* 267 Fed. 968, on the ground that no loss had been actually ascertained and that such amortization could not be regarded as depreciation which, within the meaning of that Act, had reference only to the wear and tear and absolescence of property and did not even cover the depletion of mining property. *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 524. The Government contends that the language of the Act of 1913 on depreciation is even narrower than

that of the Act of 1909, except where express qualifi- 409
cations have been made, as in the case of mines. In *New York Life Insurance Co.* v. *Anderson,* 263 Fed. 527, the Circuit Court of Appeals for this Circuit permitted the Insurance Company to revalue its securities in accordance with the prevailing market prices and to deduct the loss as depreciation under the Act of 1909. The Government's position is that the latter decision is not in accord with the views expressed by the Supreme Court, and, whether right or wrong under the Act of 1909, which permitted "a reasonable allowance for depreciation of property", would not hold under the Act of 1913, which
permitted such allowance only "for depreciation by 410
use, wear and tear of property". It has already been pointed out, however, that the amortization in question is not a revaluation to reflect market changes. It is a computation to distinguish the payment back of a portion of a capital investment from the interest or yield. It need not be assimilated to depreciation at all. In computing the return or income from bonds purchased at a premium, as a matter of economics an allowance must be made from the nominal interest paid to permit the amortization of the premium by maturity. In fact
a trustee for a life tenant and a remainderman is 411
obligated, if he purchases bonds at a premium, to reserve from the income accruing to the life tenant sufficient sums to amortize the premiums paid so that the capital may be kept intact. *In re Stevens,* 187 N. Y. 471; *McLouth* v. *Hunt,* 154 N. Y. 179. If in accordance with sound business and accounting methods the plaintiff has consistently distinguished between the yield of its investments and the amortization of its capital, I think the Commis-

412 sioner of Internal Revenue erroneously treated the amounts amortized as income.

4. The Commissioner of Internal Revenue also refused to allow the following items to be included in "the net addition, if any, required to be made within the year (1913) to reserve funds", which the law permits the plaintiff to deduct from its net income:

(*a*) $16,629.00 to meet the losses of future premiums under policies waiving the right of the Company to such premiums if the insured should be-
413 come totally and permanently disabled.

(*b*) $250,000.00 to meet plaintiff's liability on losses which occurred in the year 1913, but which had not yet been reported.

(*c*) $160,641.00 to meet the plaintiff's obligations under so-called "Nylie" contracts of employment with its soliciting agents, which entitled the agents, after twenty years of service with certain prescribed minimum results, to an annuity for life, payable monthly.

414 All these so-called reserves were kept in accordance with the requirements of the insurance laws of the State of New York. It is, however, contended by the Government that they are not reserves required by law within the meaning of the Act of 1913.

But in *Maryland Casualty Co.* v. *U. S.*, 251 U. S. 342, the Supreme Court stated:

> "The term 'reserve' or 'reserves' has a special meaning in the law of insurance. While its scope varies under different laws, in gen-

eral it means a sum of money, variously computed or estimated, which with accretions from interest, is set aside, 'reserved,' as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment. 415

In this case, as we have seen, the term includes 'unearned premium reserve' to meet future liabilities on policies, 'liability reserve' to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and 'reserve for loss claims' accrued on policies other than those provided for in the 'liability reserve', but it has nowhere been held that 'reserve,' in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance and unpaid brokerage." 416

It seems to me that within the rules then laid down by the Supreme Court the addition to these so-called reserves were properly deductible from the plaintiff's gross income. It is pointed out that a different rule as to unpaid losses is set forth in *McCoach* v. *Insurance Co. of North America*, 244 U. S. 585, and *Fink* v. *Northwestern Life Insurance Co.*, *supra*. The decisions of the Supreme Court do appear conflicting, and until the conflict is resolved I follow the most recent ruling; this rule, too, seems to me to be in accord with sound 417

418 accounting practice and the requirements of State law. The only serious question, it seems to me, arises in regard to the reserve for unpaid or unreported losses. It is said that these are already covered by the general reserve. While this may be true in a sense, I think it more truly reflects the position of the Company to permit it to estimate all payments that may have to be made on account of losses during the year, whether reported or not. If an adjustment of the general reserves becomes necessary, this may be reflected in subsequent income statements of the Company. It is questionable, in my mind, moreover, whether, admitting that
419 double reserves are required by State law as a matter of abundant precaution, such reserves are not recognized by the Revenue Act.

December 15, 1924.

JULIAN W. MACK,
Circuit Judge.

420

Assignment of Errors.

421

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS, as Collector, etc.,
Defendant.

L25—339

Assignment of Errors.

422

And now, on the 15th day of December, 1924, comes the plaintiff, NEW YORK LIFE INSURANCE COMPANY, by James H. McIntosh, its attorney, and makes and files the following Assignment of Errors.

FIRST.—The Court erred in refusing to give the first instruction requested by the plaintiff which was as follows,—

> "The jury is instructed to render a verdict for the plaintiff for $81,899.18 on account of the item referred to and described in paragraph VIII(*a*) of the plaintiff's complaint and in 423
> paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts with six per cent interest thereon from August 5, 1918."

SECOND. The Court erred in refusing to give the second instruction requested by the plaintiff which was as follows,—

> "The jury is instructed that portions of actual premiums received by the plaintiff from its several individual policyholders whose policies were on what is known as the deferred dividend

424 plan were credited to such individual policyholders during said taxing year in the aggregate sum of $8,189,918 which should not have been included as income for said year; but the Commissioner of Internal Revenue included them, and assessed and collected from the plaintiff on account thereof accordingly the sum of $81,899.18 which forms a part of the total tax complained of and the plaintiff is entitled to recover from the defendant the said sum of $81,899.18 with interest thereon at six per cent per annum from the 5th day of August, 1918"

425

THIRD. The Court erred in refusing to give the third instruction requested by the plaintiff which was as follows,—

"The jury is instructed that a portion of a premium credited to the individual policyholder who paid it to the plaintiff does not mean that the company must keep a debit and credit ledger account with each insured to entitle itself to the benefits of the non-inclusion clause contained in the law. If a policyholder paid his premium and the company credited
426 him on its records with the amount of the payment and the account taken in the taxing year disclosed that he overpaid for the previous year and shows the amount of the overpayment, then that constituted a credit to him for the sum overpaid."

FOURTH. The Court erred in refusing to give the fourth instruction requested by the plaintiff which was as follows,—

"A credit was made to an individual policyholder if the account taken in the taxing year

disclosed that he overpaid his previous annual premium and if the company so kept its records as to show at all times what the amount of such overpayment was." 427

FIFTH. The Court erred in its instruction to the jury as follows,—

"Gentlemen of the jury, the Court instructs you to render a verdict for the defendant on that claim of the plaintiff for $81,899.18 which is referred to and described in paragraph VIII(*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts." 428

WHEREFORE plaintiff prays for a reversal of said judgment and for judgment in accordance with the prayer of the plaintiff's complaint.

Dated December 19th, 1924.

JAMES H MCINTOSH
Attorney for New York Life Insurance Company,
Plaintiff and Petitioner in Error.

429

430 **Citation.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK LIFE INSURANCE COMPANY

AGAINST

WILLIAM H. EDWARDS,

431 as Collector of Internal Revenue for the Second District of the State of New York.

L25—339

CITATION

UNITED STATES OF AMERICA } ss:
Southern District of New York }

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of New York, Greeting:—

432 You are hereby admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit to be holden at the City of New York in said circuit on the eighteenth day of January next, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the Southern District of New York, wherein New York Life Insurance Company is plaintiff and you are defendant in error, to show cause, if any you know or have to say, why the judgment rendered against said plaintiff in error as in said writ of error appears should not be fully

corrected and full and speedy justice done to the 433
parties aforesaid in this behalf.

Witness my hand this 19th day of December, A. D. 1924.

JULIAN W. MACK,
Judge.

Served on me December 23, 1924.

WILLIAM HAYWARD,
Attorney for William H. Edwards, as Collector of Internal Revenue for the Second District of New York. 434

435

436 **Writ of Error.**

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK,

GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is
437 in the District Court, before you, or some of you, between NEW YORK LIFE INSURANCE COMPANY, Plaintiff, against WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of New York, Defendant.

A manifest error hath happened, to the great damage of the said Defendant as is said and appears by his complaint, WE, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then under your
438 seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 19th day of February, 1925, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief 439
Justice of the United States, this 21st day of January, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States the one hundred and forty-ninth.

ALEX. GILCHRIST, JR.
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing Writ is hereby allowed.
440

AUGUSTUS N. HAND
U. S. District Judge

441

442 **Petition for Writ.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of the State of New York,
443 Defendant.

L 25—339

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Now comes William H. Edwards, the defendant herein, by his attorney, William Hayward, United States Attorney for the Southern District of New York and feeling himself aggrieved by so much of the judgment entered herein on December 16, 1924 as provides that the plaintiff shall have and recover
444 from the defendant the sum of $7880.47 with $3007.71 interest and $26.10 costs and that plaintiff have execution therefor against this defendant in which judgment and the proceedings had in this cause prior to the entry thereof certain errors were committed to the prejudice of this defendant, all of which more fully appears in the assignment of errors filed herewith.

WHEREFORE, defendant prays that a writ of error may be allowed to him from the United States Circuit Court of Appeals for the Second Circuit to the

District Court of the United States for the Southern 445
District of New York for the correction of errors so complained of and that transcript of the record proceedings and papers in his cause duly authenticated may be sent to the said Circuit Court of Appeals.

Dated, New York, January 22, 1925.

WILLIAM HAYWARD,
United States Attorney for the Southern
District of New York,
Attorney for Defendant,
Office and Post Office Address:
U. S. Courts and P. O. Building,
Borough of Manhattan, 446
City of New York.

447

448 **Assignment of Errors.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of the State of New York,
Defendant.

L 25/339.

449

Now comes the above-named defendant by his attorney William Hayward, United States Attorney for the Southern District of New York and files the following assignment of errors and says that the judgment entered in this cause dated December 15, 1924, is erroneous and unjust for the following reasons:

I. The Court erred in holding and deciding that the item of $28,309.97 referred to in the complaint and in paragraph Twenty-first of the agreed statement of facts representing commissions advanced to
450 its soliciting agents by plaintiff prior to 1906 and repaid to plaintiff in 1913, did not constitute taxable income to the plaintiff for the year 1913 under the provisions of the Income Tax Act of October 3, 1913 and in directing a verdict in favor of the plaintiff for the sum of $283.10, representing the additional tax assessed and collected on account of said item.

II. The Court erred in holding and deciding that the item of $16,629. referred to in the complaint and in paragraph Twenty-second of the agreed state-

ment of facts representing the value as of December 31, 1913 of the future premiums waived on account of total and permanent disability constituted an allowable deduction from plaintiff's income for the year 1913 under the provisions of the Income Tax Act of October 3, 1913 and in directing a verdict in favor of the plaintiff in the sum of $166.29, representing the additional tax assessed and collected on account of said item. 451

III. The Court erred in holding and deciding that the item of $332,466.72 referred to in the complaint and in paragraph Twenty-third of the agreed statement of facts representing the amortization entered upon plaintiff's books for the year 1913 of the premium paid by plaintiff upon the purchase of its securities above par, constituted an allowable deduction from plaintiff's gross income for the year 1913 under the provisions of the Income Tax Act of October 3, 1913 and in directing a verdict in favor of the plaintiff for the sum of $3,324.67, representing the additional tax assessed and collected on account of said item. 452

IV. The Court erred in holding and deciding that the item of $250,000. referred to in the complaint and in paragraph Twenty-fourth of the agreed statement of facts representing the amount by which plaintiff increased during the year 1913 a special fund which it was required by law to carry in order to meet its liabilities upon losses which have occurred, but which had not yet been reported, constituted an allowable deduction from plaintiff's gross income for said year 1913 under the provisions of the Income Tax Act of October 3, 1913 and in directing a verdict in favor of the plaintiff for the sum of $2500., representing the additional tax assessed and collected on account of said item. 453

454 V. The Court erred in holding and deciding that the item of $160,641. referred to in the complaint and in paragraph Twenty-fifth of the agreed statement of facts representing the net addition made by plaintiff in the year 1913 to a fund required to be kept by plaintiff to meet its liabilities on contracts of employment with certain of its soliciting agents providing for the payment under certain prescribed conditions to each such agent of an income for life, payable monthly, constituted an allowable deduction from plaintiff's gross income for the year 1913, under the provisions of the Income Tax Act of October 3, 1913 and in directing a verdict in favor
455 of the plaintiff for the sum of $1,606.41, representing the additional tax assessed and collected on account of said item.

VI. The Court erred in failing and in refusing to dismiss the complaint in its entirety and in directing a verdict and the entry of judgment in plaintiff's favor for $7880.47 with $3007.71 interest and $26.10 costs.

WHEREFORE defendant prays that upon the errors aforesaid and for other errors in the record and proceedings herein the judgment herein insofar as it provides for the recovery by plaintiff from the defendant of $7880.47 with $3007.71 interest and
456 $26.10 costs, may be set aside and reversed and for naught held and esteemed and that defendant may be restored to all things which he has lost by reason of such judgment.

Dated, New York, January 22, 1925.

WILLIAM HAYWARD
United States Attorney for the Southern
District of New York,
Attorney for Defendant,
Office & P. O. Address:
U. S. Courts & P. O. Bldg.,
Borough of Manhattan,
City of New York.

Citation.

457

By the Honorable Augustus N. Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to New York Life Insurance Company, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 19th day of February 1925, pursuant to a writ of error filed in the Clerk's Office of the District Court of the 458
United States for the Southern District of New York, wherein William H. Edwards, as Collector of Internal Revenue for the Second District of the State of New York is Plaintiff-in-error and you are Defendant-in-error to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 21 day of January, in the 459
year of our Lord One Thousand Nine Hundred and Twenty-five, and of the Independence of the United States the One Hundred and Forty-ninth.

Augustus N. Hand
United States District Judge for the Southern District of New York, in the Second Circuit.

460 **Stipulation on Appeal Record.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

AGAINST

WILLIAM H. EDWARDS, As Collector of Internal Revenue for the Second District of the State of New York,
461 Defendant

} Stipulation

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated 24 January, 1925

JAMES H. MCINTOSH,
Attorney for Plaintiff.

462

WILLIAM HAYWARD,
United States Attorney,
Attorney for Defendant.

Clerk's Certificate.

463

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

NEW YORK LIFE INSURANCE COMPANY
Plaintiff in Error

vs.

WILLIAM H. EDWARDS, as Collector,
Defendant in Error.

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District in the above-entitled matter as agreed on by both parties.

464

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of in the year of our Lord one thousand nine hundred and twenty five and of the Independence of the said United States the one hundred and fiftieth

465

ALEX GILCHRIST, JR.,
Clerk.

[SEAL]

Opinion C. C. A. 466

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff-in-error,
(Plaintiff below)

AGAINST

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of the State of New York,
Defendant-in-error,
(Defendant below) 467

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of the State of New York,
Plaintiff-in-error,
(Defendant below)

AGAINST

NEW YORK LIFE INSURANCE COMPANY,
Defendant-in-error,
(Plaintiff below).

Before
ROGERS, HOUGH and HAND,
Circuit Judges. 468

JAMES H. MCINTOSH,
For Plaintiff.

EMORY R. BUCKNER, United States Attorney,
For Defendant.

THOMAS J. CRAWFORD, Assistant U. S. Attorney,

E. H. HORTON, Special Attorney, Bureau of Internal Revenue,
Of Counsel.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

469 The New York Life Insurance Company, a corporation organized and existing under the laws of the State of New York, and having its principal office and place of business in the City of New York and in the Southern District of New York brought this action to recover $90,556.19, representing a portion of an additional income tax assessed against it for the year 1913 under the provisions of the Revenue Act of October 3, 1913, and paid by it to the defendant Collector under protest.

The action was tried before the District Court and a jury of one and resulted in a dismissal of the complaint as to the principal item in dispute
470 and in the direction of a verdict in favor of the plaintiff as to the remaining items in dispute aggregating the sum of $10,927.57.

Both plaintiff and defendant have filed assignments of error and each has sued out a writ of error.

The facts are stated in the opinion.

The parties are hereinafter referred to as they stood in the court below, the New York Life Insurance Company as plaintiff, and William H. Edwards the Collector of Internal Revenue as the defendant.

471 ROGERS, *Circuit Judge.* The plaintiff is a life insurance company which is conducted on the mutual level premium plan, and it sued to recover $90,556.19 with interest thereon from August 5, 1918, that being the date on which it paid to defendant, under protest, the amount above stated and which had been assessed against it by the Collector of Internal Revenue, as an additional income tax for the year 1913 and which it is claimed was illegally assessed against it and wrongfully collected from it.

The case was heard in the court below on an 472
Agreed Statement of Facts. It discloses that the plaintiff is a mutual company transacting the business of life insurance and that its policies are issued on the purely mutual, level premium plan, and that it has no shares of capital stock nor stockholders.

The level premium plan is one under which the maximum annual contribution which any member can be asked to pay is uniform throughout the life of the policy. The person insured pays during his early years a sum in excess of the current cost of his insurance. The excess is devoted to the creation of a reserve fund, which enables the insurance 473
to be maintained in the later years, when the stipulated level premium would be insufficient to meet the current cost of insurance on the mutual premium plan. Under the level premium plan the person insured is understood to receive his insurance at cost, the company collecting its estimated premiums in advance and adjusting the actual cost afterwards.

It appears from the Agreed Statement of Facts that the Table Rate of premium provided for in life insurance on the mutual, level premium plan is calculated, First, by adopting an accepted table of 474
mortality showing the death rate for each age of life; and Second, by adopting an assumed rate of interest such as the Company may safely expect to realize upon its invested assets for the duration of all its policies. With these two factors it is calculated just what sum each insured must pay yearly in advance so as to put the Company in funds with which to pay all outstanding policies as they become claims, provided deaths occur exactly

475 in accordance with the table of mortality, and also provided the rate of interest earned on the Company's invested funds is exactly the same as the rate assumed in calculating its premiums. The sum ascertained in this way is called the net or mathematical premium. But the net or mathematical premium is not the full amount each member must pay into a going concern, because it contains no provision for expense of management and unforeseen contingencies such as excess mortality, diminished interest, investment losses, increased taxation and the like. Therefore, to provide for these there is added to the net or mathematical
476 premium a sum technically called "loading." The net or mathematical premium plus the loading constitutes the Company's Table Rate of Premium or level premium, and is the estimated sum named in the policy as premium to be paid in advance and adjusted to cost when cost is known, and is the maximum sum which the Company can ever require the insured to pay.

The tax complained of was assessed under the Act of Congress approved October 3, 1913. Section 2 of that Act provided, among other things, for a tax upon income, and the question herein involved
477 arises under that Section, subdivision G (*a*) and (*b*). 38 St. c. 16, pp. 114, 172, 173. The pertinent portions of the Act are as follows:

> "That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to * * * every insurance company, organized in the United States, no matter how created or organized, not including partnerships; * * *

Such net income shall be ascertained by de- 478
ducting from the gross amount of the income of such * * * insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties including rentals or other payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any; * * * and in 479
case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts. * * *

Provided, further, that life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policy- 480
holder, within such year."

The plaintiff on February 26, 1914, filed what it alleges was "a full, complete and true return, under oath of its president and treasurer, of its net income received during the calendar year ending December 31, 1913." It stated that the net income of the corporation arising or accruing from all sources during the calendar year ending December

481 31, 1913, was the sum of $10,057,857.40 and no more.

In due time the Commissioner of Internal Revenue assessed an income tax against the corporation in the sum of $100,578.57 upon its net income as so reported.

Thereafter, and in the year 1918, the Commissioner audited the corporation's accounts for the year 1913, and amended its returns making its net income appear to be the sum of $9,773,992.71 in excess of the net income as shown by its own return. And the Commissioner accordingly assessed against it an additional tax for the year 1913 of
482 $97,739.93, that being 1 per cent. of $9,773,992.71. Notice of this additional assessment was served on the plaintiff and payment on or before August 5, 1918, was demanded. At the same time plaintiff was informed that unless the sum demanded was paid on or before the date named there would be imposed a 5% penalty with 1% interest per month from July 24, 1918, until paid. In order to avoid the penalties and on August 5, 1918, the plaintiff paid the amount demanded, $97,739.93. This payment was made under protest, and at the same time plaintiff demanded a refund and repay
483 ment of the amount so paid except as to the sum of $7,183.74. It gave notice, that unless defendant complied with its demand, it would resort to every recourse provided by law for the recovery of the sum so paid, claiming that it was erroneously, illegally, unjustly, wrongfully and excessively assessed and collected.

Thereafter plaintiff appealed to the Commissioner of Internal Revenue and filed in the Treasury Department its claim for a refund of the tax, and on June 26, 1919, and on May 17, 1920, it filed

amendments of its claim. The Commissioner on 484
April 15, 1921, decided the claim against plaintiff and refused to refund any part of the tax.

Immediately thereafter this suit was commenced. The case was heard by the District Judge upon an Agreed Statement of Facts and with a jury of one. An opinion was filed on December 15, 1924, and judgment was entered on the next day in favor of the plaintiff in the sum of $7,880.47 with $3,007.71 interest and $26.10 costs. From this judgment both sides have sued out writs of error.

It appears that the court instructed the jury to return a verdict for defendant on the plaintiff's claim for $81,899.18. The plaintiff in making its 485
return of income for the year 1913 had not included therein the sum of $8,189,918, which it claimed it was entitled to deduct under the provision of the Act which declared that "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year." The Commissioner of Internal Revenue believing that the plaintiff was in error in not including in its 486
return this sum of $8,189,918 had, as we have seen, reassessed the plaintiff and in doing so included this sum of $8,189,918 in the amount of the income which the plaintiff received. The court below has sustained the right of the Commissioner to do what he did in that respect.

This sum of $8,189,918.00 was ascertained to be the aggregate amount of actual premiums received from individual policy holders and which had been

487 apportioned among and paid back to policy holders during the taxing year. In other words the sum of $8,189,918.00 represented the total amount of the over-payment of premiums made by its deferred policy holders in the year 1912.

The contention of the Government in this case is very clearly set forth in a letter dated June 20, 1918, and addressed to the plaintiff by the Commissioner of Internal Revenue, and which is set forth in full in the Agreed Statement of Facts. We quote from it the following:

"From the facts presented it is shown that
488 your company has many semitontine or deferred policies, under which policies the insured or his beneficiary is entitled to receive a dividend at the end of a stated period, provided the policy is in force at that time. If the policyholder dies before the date of the dividend distribution the beneficiary is entitled to receive only the face value of the policy. The dividend which may be apportioned to the policy is not paid to the benficiary. It has been observed that it is the practice of your company and similar life insurance com-
489 panies having deferred dividend policies outstanding, to apportion each year to the deferred dividend policyholder as a class, certain parts of their surplus. This surplus is not reserved for the payment of dividends and under certain circumstances may be used for other purposes.

The provisions of the taxing acts, allowing the exclusion from gross income of a life insurance company of portions of premiums, which are paid back or credited to individual

policyholders, are in the nature of an exemption from tax and should be strictly construed. A credit of an individual policy holder must be an absolute credit to such a policy holder. A provisional credit to a class of policyholders is not an absolute credit to an individual policyholder and is therefore not a credit contemplated by the taxing acts. 490

Consequently, this office is constrained to hold under the law that only such portions of the premiums actually received from the policyholders as are paid to or actually credited to the accounts of individual policyholders within the taxable year may be excluded from the gross income of a life insurance company. 491

To conform to this ruling, it is held that of the total amount of cash dividends of $9,292,939.49 for the year 1913, the portion that may be excluded from gross income is $372,717.00.

In accordance with the foregoing the final adjustment of your return of annual net income will be as follows:

Additional income per office letter of March 28, 1917....	$10,146,709.71	
Portion of cash dividends now allowed	372,717.00	492
Additional income as revised..	9,773,992.71	
Additional tax of 1%.....	97,739.93"	

It thus appears that the real question which is presented is whether in estimating the net income of the plaintiff the Government was entitled to include the aggregate amount of the ascertained, credited and accumulated over-payments of premiums which were actually apportioned among and

493 paid to its policy holders within the taxing year and which it claims amounted to $9,292,932.49.

In answering that question it is necessary to have in mind the language of the Act of 1913, heretofore quoted, which declares that "life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year."

Did the plaintiff within the year credit to the individual policyholders the sum of $9,773,992.71
494 within the meaning of the Act? The decision of this case depends upon the answer to that question. The court below evidently thought that the answer to be given is clearly indicated in the decision of the Supreme Court in Penn Mutual Life Insurance Company *v.* Lederer, 252 U. S. 523. In that case the court had before it the Act of 1913, and the right of a mutual life insurance company in computing gross income to deduct from premium receipts money derived by a mutual company from redundancy of premium paid in previous years, and paid to policyholders during the tax year as divi-
495 dends in cash and not applied in abatement or reduction of their current premiums. The conclusion reached was that such deduction could not be made. The Government in that case contended that in ascertaining the gross income of a life insurance company there should be taken the aggregate of the year's net premium receipts made up separately for each policyholder. The insurance company contended for the rule that in figuring the gross income there should be taken the aggregate full premiums received by the company less the

aggregate of all dividends paid by it to any policy- 496
holder by credit upon a premium or by abatement of a premium and also of all dividends whatsoever paid to any policyholder in cash whether applied in payment of a premium or not. The Act itself expressly provides, in a non-inclusion clause, that a life insurance company shall not include in its gross income in any year such portion of any actual premium received from any individual policyholder "as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year." In passing upon this the court said:

497

> "On the other hand what the company is seeking is not to have 'non-included' a part of the premiums which were actually received within the year, or which appear, as matter of bookkeeping to have been received but actually were not. It is seeking to have the aggregate of premiums actually received within the year reduced by an amount which the company paid out within the year; and which it paid out mainly on account of premiums received long before the tax year. What it seeks is not a non-inclusion of amounts paid in— but a deduction of amounts paid out." 498

The only point decided in the Penn Mutual case was that the Company was not entitled to deduct the amount of deferred dividends paid in any taxing year and not applied in abatement or reduction of current premiums. The conclusion reached affirmed the Circuit Court of Appeals in the Third Circuit, and we do not doubt the correctness of the law it laid down and applied to the facts of that particular case.

499 But the question which was before the court in that case is not the question which is before this court in the instant case. In the case before the Supreme Court the Penn Mutual Company claimed a right to deduct from income the amount of dividends paid to deferred dividend policyholders. This the company could not do under a law which provided that insurance companies shall deduct "the sums other than dividends paid within the year on policy and annual contracts." But the question in the instant case does not relate to "dividends" paid but to "over-payments of premiums" which is quite another matter, under a law which declares that
500 the companies "shall not include as income in any year such portion of any actual premium received from an individual policyholder as shall have been * * * credited to such individual policyholder * * * within such year." The two things are absolutely distinct and appear to be recognized to be such by the Act itself.

The Commissioner claims, and it is contended in this case, that to entitle the companies to deduct a credit it must be an absolute credit to the individual policyholder, and that a provisional credit to a class of policyholders is not an absolute credit to
501 an individual policyholder, and therefore not a credit contemplated by the taxing acts. Is this contention sound?

The Act of Congress declares that these companies shall not include as income in a particular year such portion of an actual premium received from an individual policyholder as has been credited to such individual policyholder within such year. The important thing here is that the individual policyholder must have been credited with some portion of the premium received from him in the particular

year. The method by which the plaintiff kept its 502
accounts is stated in the margin.[1] The plaintiff
insists that what it did was to find out what

[1] When plaintiff received a premium from a policyholder, recorded the sum so received from him on a card kept for that purpose containing his name and his policy number called a Premium Card. At the end of each year, including the year 1912, in taking an account of its business for the year, it ascertained from its records the total sum received as premiums for the year and the total sum received for the year from all other sources, and these two sums it added together. It then ascertained the amount of policy claims paid for the year, the amount of its current expenses for the year, the several sums required to increase its reserves and the amount required to increase the sum held for contingencies. These sums it added together and deducted the amount of them from the amount of its total receipts for the 503
year; the difference constituted the over-payments of premiums which policyholders made for the year, which it divided betewen its annual dividend policyholders as a group and its deferred dividend policyholders as a group in proper proportion. In this way it ascertained the fact that during the calendar year 1912, the over-payments of premiums made by all the plaintiff's policyholders aggregated the sum of $13,900,061, of which aggregate $5,710,143 were the total over-payments made by annual dividend policyholders and $8,189,918 the total over-payments made by deferred dividend policyholders.

Said over-payments of premiums made by its annual dividend policyholders it distributed among those policyholders by a mathematical calculation based on the amount of annual dividend insurance in force, the year of issue of the several policies, the plan of the policy,—that is, whether it was ordinary life, limited payment life, joint life, endowment or other form of policy,—and the age at issue. By 504
this calculation it ascertained the amount of over-payment made by each insured on each one thousand dollars of insurance for each year of issue on each policy plan and at each age of issue. The over-payment so ascertained, when multiplied by the number of thousands of dollars of annual dividend insurance in each year of issue, on each plan and at each age of issue, equaled precisely $5,710,143 when the products of such multiplication were all added together. This rate of over-payment for each one thousand dollars of insurance it recorded on a form in use for that purpose and bound the forms together; and it further multiplied the over-payment rate for each one thousand dollars of insurance by the amount of insurance paid for in 1912 under each policy of the year of issue, the insurance plan and the age at issue to which the over-payment rate applied, as shown by said Dividend Rate Volume; and about sixty days before the anniversary of the insurance it entered the product on

505 **each deferred dividend policyholder over-paid, just as it found out what each annual dividend policyholder over-paid; and that it credited the sum**

a card as the amount of the dividend on each such policy to be accounted for to the policyholder on the next anniversary of the policy. This card on which the total amount of the dividend was thus entered was not the same record as the Premium Card on which the plaintiff credited premiums when they were received, but was a different card kept in a different division and contained only the number of the policy, the year, month and day the insurance began, plan of insurance, amount of insurance and the age of the insured at issue, and was used solely for sending out to the annual dividend policyholder notice of the amount of said dividends payable on the anniversary of the policy, and for accounting for the same.

506 By a like mathematical calculation, it ascertained the amount of over-payment made by each deferred dividend insured on each one thousand dollars of insurance for each year of issue on each insurance plan and at each age at issue. The over-payment so ascertained, when multiplied by the number of thousands of dollars of deferred dividend insurance in each year of issue on each year of issue on each insurance plan and at each age at issue, equaled precisely the sum of $8,189,918 when the sums so multiplied were all added together. This rate of over-payment for each one thousand dollars of insurance it recorded on a form in use for that purpose, and bound these forms together, each year of issue making a separate volume. But it did not, as in the case of annual dividend policies, multiply the over-payment rate so ascertained and recorded for each one thousand dollars of insurance by the amount of insurance in force under each policy, and record the product on a card, but it merged said total over-payments made on deferred dividend policies,

507 namely, said sum of $8,189,918, into an account called in its annual report to the Insurance Department, "Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting the apportionment upon deferred dividend policies," which account recorded the accumulated over-payments of all deferred dividend policies except those on which a dividend was payable during the accountancy year, in the present case during the calendar year 1913; and after it had added to said account said sum over-paid in 1912 by the plaintiff's deferred dividend policyholders, the amount thereof was the sum of $85,142,216.

The plaintiff did not keep a ledger account with any policyholder. It kept its accounts by the card system, the card kept in one department of its organization showing one aspect of the policy and the card in another department showing another. When the policyholder paid each premium, the plaintiff immediately credited him individually on his premium card with the premium he paid.

so over-paid to each individual deferred dividend 508
policyholder at the same time and in precisely the same way as it credited it to each individual annual dividend policyholder; and that it kept the record of the credit in precisely the same way.

The defendant insists that what the plaintiff did was insufficient as it was not "credited" to the individual policyholder within the meaning of the Act.

The Statute declares that life insurance companies are not to "include as income in any year" any portion of the premium received from any individual policyholder as "shall have been paid back or credited to such individual policyholder." We 509
think the phrase "credited" to the "individual" policyholder means finally and irrevocably so credited. The credit in this case was never given to the individual policyholders as respects the controverted sum of $8,189,918. What really happened was that the credit was given to a class to which the individual holder belonged. The funds so credited to the class were carried by the company not as a part of its general funds but as a special fund, and this special fund with its accumulations from year to year was carried for the sole benefit of the class, there being no participation in the 510
accumulated fund until maturity or until the Distribution Period arrives, and then only such of the policyholders as are then surviving are entitled to the fund—the whole of which is distributed between them. The deferred dividend policies contain the following provisions:

> "That no dividend of surplus shall be allowed or paid upon this policy, unless the insured shall survive until completion of its distribution period, and unless this policy shall then be in force.

511 That surplus or profits derived from such policies on the distribution policy plan as shall not be in force at the date of the completion of their respective distribution periods, shall be apportioned among such policies as shall complete the distribution periods."

Can it properly be said that crediting the class is the same thing as crediting each individual policyholder who constitutes the class notwithstanding the fact that his right ultimately to share in the fund is not absolute but contingent wholly upon his being alive when the period of distribution is
512 reached? We do not think that it is such a crediting of the individual policyholder as is required by the Act. And in the Penn Mutual Case the Supreme Court said:

> "The non-inclusion clause * * * excludes from gross income those premium receipts which were actually or in effect paid by applying dividends."

It further said:

> "The reason for the particular provision made by Congress seems to be clear; Dividends
513 may be made, and by many of the companies have been made largely, by way of abating or reducing the amount of the renewal premium. Where the dividend is so made the actual premium receipt of the year is obviously only the reduced amount. But, as a matter of bookkeeping, the premium is entered at the full rate and the abatement (that is, the amount by which it was reduced) is entered as a credit. The financial result both to the company and to the policyholders is, however, exactly the same whether the renewal premium is reduced

by a dividend or whether the renewal premium 514
remains unchanged but is paid in part either by a credit or by cash received as a dividend. And the entries in bookkeeping would be substantially the same. Because the several ways of paying a dividend are, as between the company and the policyholder, financial equivalents, Congress, doubtless, concluded to make the incidents the same, also, as respects income taxation. Where the dividend was used to abate or reduce the full or gross premium—the direction to eliminate from the apparent premium receipts is aptly expressed by the phrase 'shall not include,' used in clause (c) above. 515
Where the premium was left unchanged, but was paid in part by a credit or cash derived from the dividend the instruction would be more properly expressed by a direction to deduct those credits. Congress doubtless used the words 'shall not include' as applied also to these credits because it eliminated them from the aggregate of taxable premiums as being the equivalent of abatement of premiums."

And it added:

"* * * Congress has acted with entire 516
consistency in laying down the rule by which in computing gross earnings certain amounts only are excluded; but the Company has failed to recognize what the principle is which Congress has consistently applied. The principle applied is that of basing the taxation on receipts of net premiums, instead of on gross premiums. The amount equal to the aggregate of certain dividends is excluded, although they are dividends, because by reason of their application the net premium receipts of the tax are to that extent less."

517 It seems to us clear that a dividend to constitute a credit in the tax year which may be deducted from or non-included in the premium paid by an individual policyholder in said year must be such a credit to such individual policyholder as effects a reduction in the amount of premium received by the company from such individual policyholder and must be the equivalent of a cash payment to or an abatement of premium of such individual policyholder. As the overpayments here involved were not, and could not be credited in 1913 to the individual policyholders who made them, the non-inclusion clause manifestly did not sanction their de-
518 duction.

The plaintiff attempts to distinguish the Penn Mutual case from the one now before this court in that the dividends were held not to be deductible in the former case "because such dividends were dividends" as distinguished from over-payments, "and because another clause of the law expressly said that insurance companies should not deduct dividends." The fact is, however, that the dividends were held to be not deductible, not because they were dividends but because they had not been applied to abate or reduce the current premiums of
519 the respective policyholders who had made them.

It appears that plaintiff owns a large amount of securities which it purchased at a premium. It amortized its securities and as a result entered upon its books during the year 1913 as a loss sustained during the year several sums which aggregated $332,466.72.

This amount so claimed as a loss represented the yearly proportion of the difference between par which the plaintiff would eventually receive upon securities owned by it if it held such securities until maturity and the purchase price above par. The

Commissioner refused to allow any part of this 520
sum as a deduction, and assessed and collected on account thereof accordingly $3,324.67 which forms a part of the additional tax imposed and which the plaintiff paid and which it is now seeking to recover in this action. The court below, in passing on this phase of the case, held that the Commissioner of Internal Revenue was in error in refusing to allow any part of this sum as a deduction.

This court in New York Life Insurance Co. *v.* Anderson, 263 Fed. 527, had a somewhat similar question before it. In that case, however, the question arose under the Corporation Tax Act of 521
August 5, 1909. That Act in Section 38 provided that the net income should be ascertained "by deducting from the gross amount of the income of such * * * insurance company, received within the year from all sources * * * (2) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, * * *." The court below had held that under this provision the company in ascertaining its losses sustained within the year could not include the depreciation of securities taken at market 522
value if the securities had not actually been sold. In his opinion that Court said:

> "A merchant, on the other hand does not ordinarily include the variations in the market values of his stock in counting his profits. They may shortly be restored to their value, and the time to charge his profit with them is when they are sold, and the gain or loss finally ascertained." (262 Fed. 215, 217.)

This court reversed the case and said:

> "It is here admitted that, judged by any standard familiar to business men, the secur-

523 ities of plaintiff were worth at the end of 1910 several million dollars less than they were at the beginning of that year. It is further admitted that, not only was it the business custom of plaintiff to revalue its securities in accordance with the market annually, but that such procedure was and is a reasonable business conservatism, and a frequent, though not universal, statutory requirement.

Under this taxing act the question is not strictly whether depreciation in market value is a loss, but whether, when Congress specifically includes within 'losses actually sustained
524 within the year, * * * a reasonable allowance for depreciation of property,' depreciation does not become a loss, no matter what persons other than Congress may think on the subject.

We have no doubt that this loss in market value is depreciation. The word means, be derivation and common usage, a 'fall in value; reduction of worth'; and it seems to us to require mention only to prove that the average citizen, for whom statutes are assumed to be made, would judge depreciation of his own
525 bonds by the opinion of the public, however thoroughly convinced of the ultimate wisdom of holding onto what had depreciated."

The ruling by the District Judge in the instant case, holding that the Commissioner of Internal Revenue erroneously treated the amounts amortized as income, has applied to the facts of this case the doctrine laid down in the Anderson case. But the language of the Act of 1913 which is the Statute herein involved differs somewhat from that which governed the Anderson case. It provides that net income is to be ascertained by deducting * * *

(second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property if any." The Act of 1913 thus restricts the "reasonable allowance for depreciation" to depreciation "by use, wear and tear." We do not think the depreciation of securities, which had not been sold during the year, comes under the clause relating to "depreciation by use, wear and tear;" neither do we think that it is "a loss actually sustained" during the year. In our opinion the court was in error in its holding upon this subject. 526

Judgment is reversed and cause remanded upon the sole ground that the court erred in deciding that the Commissioner of Internal Revenue was not entitled to assess and collect a tax of $3,324.67 on the sum of $332,466.72 which plaintiff claimed it had a right to deduct as a result of the depreciation of its securities during the year. 527

Judge Hand participated in the conference, after the argument, and concurred in the decision of the case as above announced. He was absent when the opinion was written and filed, but authorized the writer to express his concurrence in the result.

Judge Hough dissents. 528

529 **Order for Mandate.**

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York on the 6th day of August one thousand nine hundred and twenty five.

Present:

Hon. HENRY WADE ROGERS,
Hon. CHARLES M. HOUGH,
Hon. LEARNED HAND
Circuit Judges.

530

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error and
Defendant in Error,

v.

WILLIAM H. EDWARDS, as Collector, etc.,
Defendant in Error and
Plaintiff in Error.

Error to the District Court of the United States for the Southern District of New York.

531 This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and cause remanded to the District Court on the sole ground stated in the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.
C. M. H.

(endorsed) 532

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

NEW YORK LIFE CO.,

v

WM H. EDWARDS

533

ORDER FOR MANDATE

United States Circuit Court
of Appeals
Second Circuit
Filed Aug 10, 1925
WILLIAM PARKIN, Clerk.

534

535 **Order Granting Stay.**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs

536

WILLIAM H. EDWARDS, as Collector of Internal Revenue,
Defendant in Error.

Upon application of the plaintiff in error, the defendant in error concurring, it is

ORDERED that the mandate herein be stayed and the execution and enforcement of the judgment of the court be stayed until further order of the court to enable either party to apply for and obtain a
537 writ of certiorari from the Supreme Court, it being understood that the application to the Supreme Court is to be made forthwith.

HENRY WADE ROGERS
U. S C. J.

Dated at Chambers this
14th day of August, 1925.

Order Granting Stay.

(endorsed) 538

N. Y. LIFE INSURANCE Co

v

EDWARDS

ORDER GRANTING STAY

United States Circuit Court 539
of Appeals
Second Circuit
Filed Aug 14, 1925
WILLIAM PARKIN, Clerk.

540

541 **Clerk's Certificate.**

UNITED STATES OF AMERICA, } ss.
Southern District of New York. }

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 177 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

542 *against*

WILLIAM H. EDWARDS, as Collector of Internal Revenue,
Defendant in Error

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of August in the year of our Lord One Thousand Nine Hundred and twenty five and of the Independence of the said
543 United States the One Hundred and fiftieth.

WM. PARKIN
Clerk.

[SEAL]

In Supreme Court of the United States

Order Allowing Certiorari—Filed October 26, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In Supreme Court of the United States

Order Allowing Certiorari

Filed November 30, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

And it is further ordered that this cause be, and the same is hereby, assigned for argument with No. 712, heretofore assigned for March 1st next, as one case.

78729—26——2

Supreme Court

OF THE UNITED STATES

October Term, 1927

No. 27

NEW YORK LIFE INSURANCE COMPANY,

Petitioner,

against

WILLIAM H. EDWARDS as Collector of Internal Revenue for the Second District of the State of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

JAMES H. McINTOSH,
Attorney for Petitioner,
120 Broadway,
New York, N. Y.

IN THE

Supreme Court of the United States.

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

AGAINST

WILLIAM H. EDWARDS as Collector of Internal Revenue for the Second District of the State of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES,—

Your petitioner, NEW YORK LIFE INSURANCE COMPANY, applies for a Writ of Certiorari to review a decision, by a divided court, of the Circuit Court of Appeals for the Second Circuit filed July 30, 1925, and as ground for said writ says,—

FIRST: That said Circuit Court of Appeals has decided in said suit an important question of federal law which has not been but should be settled by this court.

SECOND: That the case involves questions of such public and national importance as require that a consideration and determination thereof should be made by this court.

J43934

Summary and Brief Statement of the Matters Involved.

1. This is a test case. It involves additional 1913 income taxes. The decision will control the petitioner's pending suits to recover additional federal taxes paid

For	1914	$78,422.51
"	1915	72,793.21
"	1916	142,288.94
"	1917	1,012,737.97
"	1918	1,739,243.91

Its tax returns for 1919 and 1920 have not yet been audited. The Revenue Act of 1921 changed the law.

Many other life insurance corporations are similarly situated, and their like pending suits are awaiting, and will be controlled by, the final decision of the court in this case.

2. The case requires the construction and application of the following clause of the Revenue Act of 1913 which was re-enacted in each Revenue Act down to 1921, to wit:

> "*and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year."

3. In mutual insurance on the level premium plan, such as your petitioner transacts, each policyholder is entitled to his insurance at cost; but each

* The material part of the statute is printed at the back of the brief as Appendix I.

pays yearly in advance an estimated sum which is reduced to cost when the accounting taken after the end of each calendar year discloses what cost was. The over-payment ascertained by the accounting belongs to the policyholder. It is the portion of actual premium received from each individual policyholder in excess of cost, and is paid back or credited to such individual policyholders or treated as an abatement of premium of such individual policyholder, in the year the accounting is made.

4. In administering this law, the Treasury Department correctly did not include as income for the year such portions of actual premiums received from *annual dividend policyholders* as were paid back or credited to or treated as an abatement of premium of such individual policyholders, within the taxing year; but the Department refused to accord this same treatment to such like portions of actual premiums received from individual *deferred dividend policyholders* as were credited to such individual policyholders within the taxing year. This refusal made your petitioner's taxable income for the year appear to be $8,180,918 greater than the law allowed, and increased its tax accordingly.

5. An annual dividend policy is one which requires the company annually on the anniversary of the insurance to pay back the over-payment made the year before, or to treat it as an abatement of premium, or to let it stand as a credit to the policyholder, as he shall elect. A deferred dividend policy contains no such options. It requires the company to credit the policyholder with the over-payment he made the year before, and to pay it back to him, with interest, on the deferred

dividend date named in his policy, usually twenty years after the date of the policy, together with the policyholder's proportionate share of the like credits of those of his class who died or lapsed their policies before the dividend date named therein (R. 45 *et seq.;* Ex. A, p. 98; Ex. B, p. 110).

This is the only difference between an annual and a deferred dividend policy. The premium for each policy is the same per $1,000 of insurance for the same age and plan, and the over-payments which are ascertained each year at the same time and in the same way are the same in amount for each $1,000 of insurance (R. 45 *et seq.*).

6. As soon as practicable after the 31st of December, 1912, your petitioner took an account of its business for the year, which showed its policyholders had over-paid it for the year the aggregate net sum of $13,900,061, consisting of over-payments made by annual dividend policyholders $5,710,143, and by deferred dividend policyholders $8,189,918 (R. 41 *et seq.*).

7. (R. 42 *et seq.*) Said over-payments of premiums made by your petitioner's annual dividend policyholders it distributed among those policyholders by a mathematical calculation based on the amount of annual dividend insurance in force, the year of issue of the several policies, the plan of the policy,—that is, whether it was ordinary life, limited payment life, joint life, endowment or other form of policy,—and the age at issue.

At the same time and in the same way your petitioner distributed among its deferred dividend policyholders the $8,189,918 over-paid by them. Each individual policyholder it credited in the taxing year with the over-payment of premium made

by him (R. 42 *et seq.*). For an illustration of the record of this credit see Exhibit 5 at page 119 and the explanation of Exhibit 5 at page 47 *et seq.*, and page 42 *et seq.*

8. Exhibit 5 shows that the portion of actual premium received from each individual deferred dividend policyholder was credited to such individual policyholder within the taxing year, and, with the explanation contained in the record, shows where and how it was credited. For example, each individual deferred dividend policyholder whose policy was taken out in 1905 on the ordinary life plan was credited in 1913 on Exhibit 5 in the column headed "8 year dividend rate per M, 1913" with $3.40 for each $1,000 of his insurance, if he was age 21 when he took out his policy; with $3.48 if he was age 22; with $3.56 if he was age 23, and so on for all ages. And every other policyholder on every other plan was similarly credited (R. 43 *et seq.*). These individual credits made in 1913, when all added together, amounted to $8,189,918, and were carried as a liability (R. 44).

9. *Penn Mutual Life Insurance Company* v. *Lederer*, 252 U. S. 523, involved the non-inclusion under this clause in the law of *dividends* paid to deferred dividend policyholders during the taxing year. These dividends were composed of (R. 49), (1) the portions of premiums received and credited during all the years the policy had been in force, and contained no portion of premium credited during the taxing year except the sum credited for the over-payment made the year before; plus (2) interest compounded annually on all the credited over-payments; plus (3) the policyholder's proportionate

share of the credited and accumulated over-payments of the members of his class whose policies were not in force on the dividend date named in the taxing year.

Dividends paid, which was in dispute in the *Penn Mutual* case, is therefore a very different thing from the sum in dispute here. The sum in dispute here contains no portions of premiums not credited within the taxing year, contains no interest, no lost credits of other policyholders. Every dollar, every penny of it is exactly described in the plain language of the law,—portions of actual premiums received from individual policyholders which were credited to such individual policyholders within the taxing year.

10. As I understand the trial court's opinion, the learned Judge thought the question here was the same as in the *Penn Mutual* case and was controlled by that decision (R. 135). The Circuit Court of Appeals appears so to have understood the trial court's opinion (R. 165).

The Circuit Court of Appeals saw that the question here was not the question that was before the court in the *Penn Mutual* case (R. 167) and yet the majority of the Circuit Court seemed to have followed the *Penn Mutual* decision (R. 171 *et seq.*).

Circuit Judge Hough dissented.

A question of federal law which involves the important consequences that this question involves, not merely to your petitioner and its policyholders but to the many other like companies similarly situated and their policyholders, ought not to be so settled. It has not been but should be settled by this court.

WHEREFORE, your petitioner prays for an order requiring by certiorari that said cause be certified to the Supreme Court for determination by it in accordance with Section 240 of The Judicial Code, and the rules and practice of this court in such cases. And your petitioner will ever pray.

JAMES H. MCINTOSH
Attorney for Petitioner,
Office and Post Office Address,
120 Broadway,
New York, N. Y.

STATE, COUNTY AND CITY OF NEW YORK } ss.:

JOHN C. MCCALL, of lawful age, being first duly sworn, deposes and says that New York Life Insurance Company, the above petitioner, is a corporation and that he is Vice-President of said corporation and authorized by it to make this verification; that he has read the foregoing petition and knows the contents thereof, and that he believes the facts stated and allegations therein made are true.

JOHN C. MCCALL

Subscribed in my presence and sworn to before me this 26th day of August, 1925.

ANNA C. CRAGG
Notary Public, Kings County [SEAL]
Kings County Clerk's No. 276 Register's No. 6301.
Certificate filed in
New York County Clerk's No. 574B,
Register's No.
Commission expires: March 30th, 1926.

SUPPORTING BRIEF

IN THE

Supreme Court

OF THE UNITED STATES.

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

against

WILLIAM H. EDWARDS AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Official Report of Opinions Delivered.

The Trial Court's opinion is found in 3 Fed., 2d, 280, and in the Record at page 126.

The opinion of the Circuit Court of Appeals is not officially reported, but for it see Record, page 156.

Grounds of this Court's Jurisdiction.

(1) Date of Trial Court's judgment, December 15, 1924 (R. 22). Date of Circuit Court of Appeals' judgment, August 10, 1925 (R. 177).

(2) This is a civil case arising under the Revenue Act of 1913 in which your petitioner seeks to recover $81,899.18 additional income taxes paid for 1913 because the Treasury Department refused not to include as income $8,189,918 which consisted of portions of actual premiums received from your petitioner's individual policyholders which were credited to such individual policyholders within the taxing year; and also to recover $3,324.67 additional taxes paid for said year because the Treasury Department refused to allow what your petitioner claims is a loss actually sustained within said year of $332,466.72. Your petitioner claimed at the close of the trial that it was entitled to an instruction for the recovery of each of said sums. The court refused so to instruct on the claim for $81,899.18 (R. 122) and instructed on that item for the defendant (R. 124) and entered judgment dismissing your petitioner's complaint with respect thereto (R. 22). The Circuit Court of Appeals affirmed the judgment dismissing the plaintiff's complaint as to said item of $81,899.18 (R. 177) and reversed the judgment in favor of the plaintiff on its said claim for $3,324.67 (R. 177).

(3) The statutory provisions under which jurisdiction is invoked are The Judicial Code, Section 24, Fifth, and Section 240 as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT,—

To avoid repetition, I beg to refer the Court to the foregoing Petition for Writ of Certiorari which contains the shortest and plainest statement of the case I can make.

Specification of Errors Intended to be Urged.

Your petitioner, if it be permitted to do so, will urge its assignments of error as follows (R. 141),—

FIRST: The Court erred in refusing to give the first instruction requested by the plaintiff which was as follows:

> "The jury is instructed to render a verdict for the plaintiff for $81,899.18 on account of the item referred to and described in paragraph VIII (*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts, with six per cent interest thereon from August 5, 1918."

SECOND: The Court erred in refusing to give the second instruction requested by the plaintiff which was as follows:

> "The jury is instructed that portions of actual premiums received by the plaintiff from its several individual policyholders whose policies were on what is known as the deferred

dividend plan were credited to such individual policyholders during said taxing year in the aggregate sum of $8,189,918 which should not have been included as income for said year; but the Commissioner of Internal Revenue included them, and assessed and collected from the plaintiff on account thereof accordingly the sum of $81,899.18 which forms a part of the total tax complained of and the plaintiff is entitled to recover from the defendant the said sum of $81,899.18 with interest thereon at six per cent per annum from the 5th day of August, 1918."

THIRD: The Court erred in its instruction to the jury as follows:

"Gentlemen of the jury, the Court instructs you to render a verdict for the defendant on that claim of the plaintiff for $81,899.18 which is referred to and described in paragraph VIII (*a*) of the plaintiff's complaint and in paragraphs First to Twentieth, both inclusive, of the Agreed Statement of Facts."

And will also urge that the Circuit Court of Appeals erred in sustaining the defendant's third assignment of error, and in reversing the case on that point, as follows (R. 151):

"III. The Court erred in holding and deciding that the item of $332,466.72 referred to in the complaint and in paragraph Twenty-third of the agreed statement of facts representing the amortization entered upon the plaintiff's books for the year 1913 of the premium paid by plaintiff upon the purchase of its securities above par, constituted an allowable deduction from plaintiff's gross income for the year 1913 under the provisions of the Income Tax Act of October 3, 1913 and in directing a verdict in favor of the plaintiff for the sum of $3,324.67, representing the additional tax assessed and collected on account of said item."

ARGUMENT.

I.

Summary of the Argument.

July 29, 1912, Judge Cross of the Federal District Court of New Jersey decided the case of *Mutual Benefit Life Insurance Co.* v. *Herold*, 198 Fed. 199, in which he made it clear that over-payments of premiums were not income of the company. Hence, Congress in framing the Revenue Act of 1913 added this clause to exclude these over-payments from income. And to do this they used language that embraced everything that could be done with them,—"paid back, credited, or treated as an abatement of premium".

The clause does not speak of dividends; it speaks only of portions of actual premiums received, which may be very different from dividends.

The meaning of the clause is too plain for construction; but the Circuit Court of Appeals has construed all meaning out of the important word credited, and allowed it no practical meaning or effect at all. And yet, Congress used that word for the very purpose of embracing in the exclusion the over-payments made by deferred dividend policyholders, because they were the only over-payments which were credited only within the taxing year. The over-payments of annual dividend policyholders were paid back or treated as an abatement of premium each year and did not require the word credited to embrace them.

To hold that this clause applied to annual dividend policies only and not to deferred dividend

policies is not merely contrary to the plain and unambiguous language of the law, but discriminates (1) between taxpayers of the same class and (2) between different groups of policyholders of the same taxpayer. But if the law is taken for just what it says and administered according to its plain terms, there will be no discrimination either between companies or between policyholders. They will all be treated alike as Congress intended they should be.

II.

The origin of this clause of the law discloses its purpose and intent.

Mutual Benefit Life Insurance Company v. *Herold*, 198 Fed. 199, decided July 29, 1912, and what District Judge Cross said in his opinion in that case suggested this clause.

That case involved the right of the Mutual Benefit to deduct from gross income under the Revenue Act of 1909 dividends on annual dividend policies which the company paid during the taxing year by deducting them from premiums then due. The court held with the company, notwithstanding said Revenue Act provided that insurance companies shall deduct from gross income "the sums *other than dividends* paid within the year on policy or annuity contracts".

Fed. Statutes, Annotated, Vol. 4, p. 255, Appendix II.

But the precise issue in that case is not the important thing when we are looking at it as the origin of this clause in the law. In this view of

it, the court's reasons for its decision is the important thing. Judge Cross there made it very clear by his own sound reasoning and from the authorities both English and American from which he quoted and to which he said he found no dissent,—

FIRST: That in mutual insurance each policyholder is entitled to his insurance at cost;

SECOND: That each policyholder pays yearly in advance an estimated sum which is reduced to cost when the experience of the year discloses what was cost; and

THIRD: That the difference between the estimated sum paid in advance (the premium) and cost belongs to the policyholder, not to the company, and does not "in any wise or to any extent represent earnings or profits received by the company so as to constitute it a part of its income".

When in framing the Revenue Act of 1913 Congress saw from Judge Cross' opinion that these over-payments were not income of the company, it was up to them to meet the situation because they could only tax income. The court had held in the *Mutual Benefit* case that over-payments could not be included in income when returned to the policyholder as an abatement of his current premium, but in so holding the court also made it clear that they were not income of the company at all. Therefore, in framing this first income tax law, Congress said "As these over-payments are not income of the company, and as we can only tax income, we must frame a clause that will meet the situation by excluding them from income in every conceivable case." Hence this clause of the law with its all-embracing terms.

III.

This clause does not speak of dividends. It speaks only of portions of actual premiums received, which may be different from dividends.

When the policy requires a settlement with the policyholder each year, the sum paid as a dividend is the same as the over-payment of premium that year ascertained. It contains no interest and no other sum except the over-payment of premium. But when the dividend is deferred, it contains something more than the over-payment;—it contains interest and the policyholder's share of the over-payments of those of his class whose policies were not in force in the dividend year.

Hence the careful use of the language employed, —not dividends, but "portions of actual premiums received". The language used shows that Congress was determined to exclude from income what Judge Cross had shown was not income, and nothing else. And this exclusion was for all companies alike and for all policyholders alike, without any discrimination.

The portions of actual premiums received from each individual deferred dividend policyholder which your petitioner credited to each such individual policyholder in 1913, when all added together, made the sum of $8,189,918. But the dividends which your petitioner paid to its deferred dividend policyholders in 1913 amounted to the sum of $9,594,009.64 (R. 30).

IV.

The meaning of this clause is so plain that it is not open to construction; but the Circuit Court of Appeals has construed it so as to give portions of actual premiums credited no practical meaning or effect at all.

The record makes it clear how, in the accounting made after the end of 1912, your petitioner ascertained how much all its policyholders over-paid; how much of this its annual dividend policyholders over-paid, and how much of it its deferred dividend policyholders over-paid. From these total over-payments it calculated the amount which each policyholder had over-paid, and credited each deferred dividend policyholder's over-payment in the record kept for this purpose. These credits consisted, as the law says, of portions of actual premiums received from individual policyholders which were credited to such individual policyholders within the taxing year, and aggregated $8,189,918. Could anything be plainer?

And yet in concluding the discussion of this subject the learned Circuit Judge who wrote the opinion says (R. 173),—

> "It seems to us clear that a dividend to constitute a credit in the tax year which may be deducted from or non-included in the premium paid by an individual policyholder in said year must be such a credit to such individual policyholder as effects a reduction in the amount of premium received by the company from such individual policyholder and must be the equivalent of a cash payment to or an abatement of premium of such individua! policyholder."

Now just stop to consider that a moment.

In the first place, we do not claim the right to have *dividends* deducted or non-included. That is not the question in the case.

But in the second place, how would you make a credit so as thereby to effect "a reduction in the amount of premium received"? If it had that effect it would not be a credit at all. It would be a payment,—"treated as an abatement of premium".

Or how could a credit "be the equivalent of a cash payment"? A credit can be nothing more than a written admission of an indebtedness to the person credited. It is never the equivalent of cash; and certainly could not be the equivalent of cash so as correspondingly to reduce the premium receipts of the company, which, as I understand the court's conclusion, is the only sort of credit the court thinks this clause means.

Suppose these credited over-payments could not be lost to the policyholder by any future contingency except the insolvency of the company, would they then be the equivalent of cash or reduce by one penny "the amount of premium received by the company"?

Clearly the decision of the court gives this common word, credited, intended in this statute to be of so much importance and to put all mutual companies and all policyholders on a plane of perfect equality, no practical meaning or effect at all.

Is it unfair to assume that the authors of this law knew something about the business of life insurance? If they did, nay even if they merely knew what everybody knows, they knew there were both annual and deferred dividend policies, and that some companies wrote only the one and others both; they knew that the over-payments on annual dividend policies were each year paid back or

treated as an abatement of premium; and on deferred dividend policies were always each year credited. If, therefore, they had intended this clause to apply only to annual dividend policies, they would not have used the word credited at all; paid back or treated as an abatement of premium would have accomplished what they wanted to do. But it was not their intention that this clause should apply to the over-payments on annual dividend policies only; it was their intention to treat all companies and all policyholders alike. Hence they used the word credited for the special purpose of including the over-payments of deferred dividend policyholders too.

V.

To hold that this clause applies to annual dividend policies only and not equally to deferred dividend policies is not merely contrary to the plain and unambiguous language of the law, but discriminates (1) between taxpayers of the same class, and (2) between different groups of policyholders of the same taxpayer.

Some companies doing business on the mutual, level premium plan—such as the Mutual Benefit, the Connecticut Mutual, the Home Life of New York, the Massachusetts Mutual, the Provident Life and Trust, and many others—have issued only the so-called annual dividend policies; some other

like companies—such as the Northwestern, the Penn Mutual, the Union Central, the National Life of Vermont, and many others—have, like your petitioner, issued policies on both of these plans.

(1) This law as now construed discriminates between companies.

It imposes a tax upon your petitioner and other companies similarly situated which is not imposed at all upon like mutual companies which issued only annual dividend policies. In other words, the Mutual Benefit, the Connecticut Mutual and all other annual dividend companies deduct each year from gross income 100% of the over-payments made by their policyholders; but this company and others with deferred dividend policies on their books cannot do this; they can only deduct a part of the over-payments,—in 1913 for this company 41% only (R. 42), and in each subsequent year a similar percentage.

The resulting tax in 1913 by this discrimination, $81,899.18, is not a serious thing in competition,—its worse phase is its illegality and its injustice. But when we come to later years, $1,739,243.91 in 1918, the illegal discrimination becomes more than an injustice, it becomes a telling talking point for our competitors. Say the agents of our competitors,—"How can you expect the New York Life to insure you at as low a cost as my company can do when you think of the taxes it has to pay which my company doesn't have to pay at all? Why in one year that company was taxed $1,739,243.91 where my company wasn't taxed a cent." How can our agents answer this? They cannot answer it, because it is so.

(2) It discriminates also between policyholders.

Under the court's construction, the annual dividend policyholder gets back his over-payments free from any tax; the deferred dividend policyholder does not; his over-payments are taxed, this tax is deducted from them and the balance returned,—a less sum than was returned to the annual dividend policyholder whose premium and whose over-payments were the same. That is, this law as so construed makes the insurance of one policyholder cost him more than does the insurance of another policyholder of the same class and equal expectation of life.

Discrimination in mutual insurance is so objectionable that nearly all the states have passed laws forbidding life insurance corporations, under heavy penalty, to "make or permit any discrimination between individuals of the same class or of equal expectation of life".

New York Insurance Law, Section 89.

Did Congress intend to discriminate between them? I do not believe so. There is nothing in this law to indicate such intention.

If the law is administered according to its plain terms and unmistakable meaning, there will be no discrimination either between companies or between policyholders. They will all be treated alike as the law intends them to be.

Respectfully submitted,

JAMES H. MCINTOSH,
Attorney for Petitioner,
120 Broadway,
New York, N. Y.

21 August, 1925.

Appendix I.

Revenue Act of 1913
(Federal Statutes Annotated, Vol. 4, p. 245).

"G. (*Tax on net incomes of corporations.*)

(*b*) Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint-stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any; and in the case of mines a reasonable allowance for depletion of ores and all other natural deposits, not to exceed 5 per centum of the gross value at the mine of the output for the year for which the computation is made; *and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividend paid within the year on policy and annuity contracts:* Provided, That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: Provided further, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less

amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof *and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year;* (third) the amount of interest accrued and paid within the year on its indebtedness to an amount of such indebtedness not exceeding one-half of the sum of its interest bearing indebtedness and its paid-up capital stock outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount of its indetbedness not exceeding the amount of capital employed in the business at the close of the year:"

Appendix II.

Revenue Act of 1909,

(Federal Statutes Annotated, Vol. 4, p. 255.)

"Sec. 38 (*Excise tax on corporations.*)

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company, or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, *and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds;* (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed:"